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No. 07-765

In The Supreme Court of the United States

JAMES TERRY STINSON,

Petitioner,

v.

THOMAS AMMONS, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner unconstitutionally convicted of aggravated sodomy, because the trial court gave a jury instruction that effectively mandated the jury to find "force" when no physical force was proven at trial? By stating affirmatively in such jury instruction that the victim was in fear and that such "fear" was equivalent to "force," did such a jury instruction, when coupled with an instruction as to proof by circumstantial evidence, create a presumption that unconstitutionally shifted the burden to the defendant?

2. Has the Petitioner been unconstitutionally convicted of aggravated sodomy when no words or acts of the Petitioner constituted "force," a "threat of force," or "intimidation?" When the only evidence of "intimidation" is the status of the Petitioner as a uniformed, on-duty police officer, does it violate Due Process to attribute "force" to the Petitioner as a result of such status?

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The denial of Petition for Rehearing and Petition for Rehearing En Banc of the United States Court of Appeals for the Eleventh Circuit, September 6, 2007, is set forth in the Appendix at A-1. The Order of the United States Court of Appeals for the Eleventh Circuit, July 16, 2007, denying a Certificate of Appealability is set forth in the Appendix at A-3. The Order of the United States District Court for the Northern District of Georgia, March 13, 2007, adopting the Magistrate Judge's Report and Recommendation and denying the Petitioner's Petition for Writ of Habeas Corpus is set forth in the Appendix at A-9. The Magistrate Judge's Order and Final Report and Recommendation recommending denying of the Writ of Habeas Corpus, October 10, 2006, is set forth in the Appendix at A-26. The decision of the Supreme Court of Georgia, March 28, 2005, reversing the Final Order of the Superior Court of Muscogee County, Georgia granting Writ of Habeas Corpus, is set forth in the Appendix at A- 53. The Final Order of the Superior Court of Muscogee County, Georgia, March 27, 2004, granting Writ of Habeas Corpus is set forth in the Appendix at A-56. The decision of the Court of Appeals of Georgia, March 30, 2002, affirming Petitioner's conviction for aggravated sodomy is set forth in the Appendix at A-62.

JURISDICTION

The final judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on September 7, 2007. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V. No person shall be held to answer ... nor be deprived of life, liberty, or property without due process of law;

AMENDMENT XIV. SECTION 1. ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This Petition presents an important constitutional question having broad applicability to the criminal law because the essential element of force of the Petitioner's conviction for aggravated sodomy has never been proven or articulated in detail in the arrest warrant, indictment, or at original trial, nor demonstrated in subsequent appeals. The Petitioner's conviction for aggravated sodomy was founded upon an unconstitutional mandatory presumptive jury instruction that "force" should be presumed and did not have to be proven. The Eleventh Circuit's decision misconstrues the constitutional deficiency of the jury instruction of "Lack of resistance induced by fear is not cognizable consent but is force" which is an unconstitutional presumption that violates the Due Process by forcing the accused to prove his innocence instead of forcing the State to prove his guilt.

Sandstrom v. Montana 442 U.S., 510, 524 (1979) set a bright line constitutional rule followed generally by other Circuits that, "A state must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant" by means of such a presumption.

The jury instruction clearly established a "presumption" that "Lack of resistance, induced by fear, is not legally cognizable consent but is force" and as such is an unconstitutional mandatory presumption. In the case of *Stinson*, County Magistrate Judge Lewis defined aggravated sodomy as, "when that person commits sodomy with force and against the will of the other person." However, in the

next sentence of the jury instruction he unconstitutionally instructed the jury to presume force by making it equivalent with the victim's fear regardless of the action of the Petitioner, "the lack of resistance induced by fear is not legally cognizable consent, but is force." The charge also merges lack of consent and force to presume both without any proof of these necessary elements of the offense of aggravated sodomy.

The District Court Order found that because the alleged victim felt intimidated the missing element of "force" was somehow supplied by the Petitioner. Regardless of how she said she felt, there were no intimidating actions by the Petitioner. The State attempted to construct force by the Petitioner because he was in uniform with a badge, a radio, and a holstered side-arm that never was touched or threatened. The Magistrate Judge and the District Court's Order as well as the State cannot cite any words or actions by the Petitioner which are indicative of force, threat of force or intimidation.

The Superior Court of Muscogee County granted the Writ of Habeas Corpus, *inter alia,* because Judge Johnston, after a hearing and reviewing the transcript, found that "there was no force, threat of force or intimidation of force." The Georgia Supreme Court reversed on the grounds that the claim of actual innocence by stating this claim was procedurally barred. The Magistrate Judge in the Report and Recommendation attempted to construct force by the testimony of the alleged victim that the Petitioner "guided" her head during the course of performing oral sex, however, the alleged victim stated that when Petitioner put his arm around her

for oral sex, "there wasn't any forcefulness about it when he put his hand back there" [Trial Tr. 859]. In spite of inconsistent attempts to find force in record of Petitioner's trial, never has ANY COURT cited words, actions, or deeds of Petitioner legally defined as force, threats, or intimidation of force – because there are none. Each court has passed over this wholly absent element citing different theories how the victim "felt intimidated," but not what Petitioner "did" to cause her intimidation. The District Court assumes the victim's feelings are evidence of a criminal act on the part of Petitioner while failing to specify any words, actions, or deeds which constitute force, threat, or intimidation of force by Petitioner.

The District Court states "the relevant inquiry for this court is whether the evidence could lead a rational trier of facts to find that the essential elements of the crime of aggravated sodomy [were] proven beyond a reasonable doubt." The "essential elements" have never been proven, not in the arrest warrant, the indictment, at the original trial nor demonstrated in subsequent appeals, and the verdict found by the jury was based upon an unconstitutional mandatory presumptive jury instruction that force could be presumed and did not have to be proven.

State Proceedings. Petitioner sought reversal of his conviction on direct appeal, which was denied by the Georgia Court of Appeals in *Stinson v. State*, 256 Ga. App. 902 (2002). Thereafter, new counsel filed an extraordinary motion for new trial, which was denied by the Superior Court of Gwinnett County. The Georgia Court of Appeals denied an application for discretionary appeal. A petition to the

Georgia Supreme Court for writ of certiorari was also denied. Petitioner then sought state habeas relief.

By Order of May 27, 2004, the Honorable Robert G. Johnston, III, of the Superior Court of Muscogee County, granted the Petitioner's application for a writ of habeas corpus. In his accompanying Findings of Fact and Conclusions of Law, Judge Johnston found, *inter alia*, that "[t]he element of force ... was not proven at trial which is a necessary element for the conviction of aggravated sodomy. ... The Petitioner cannot be legally convicted of aggravated sodomy without the Sate proving the necessary element of force." The Court further found Petitioner's former counsel "did not disclose that he had formerly represented Gwinnett County which was a potential conflict of interest because the complaining witness was in a lawsuit with Gwinnett County arising out of the alleged conduct of the Petitioner ... ."

The grant of habeas relief was reversed by the Supreme Count of Georgia in *Thompson v. Stinson*, 279 Ga. 196 (2005), in a holding that focused, principally, on the Petitioner's extraordinary motion for new trial and whether denial of that motion foreclosed collateral review.[1] The court found that the issues raised on the habeas petition had been considered previously by the Court of Appeals.

Federal Proceedings. On July 16, 2007, the Honorable Frank M. Hull, Circuit Judge, acting for the United States Court of Appeals for the Eleventh

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[1] See *infra*, with respect to the Supreme Court's brief comment on the evidence as to "force."

Circuit, pursuant to 11th Cir. R. 22-1(d), denied the Petitioner's motion for a Certificate of Appealablility. Judge Hull found that the Petitioner failed to make a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253 (c)(2) (hereinafter referred to as the "Order").

Previously, the Honorable Orinda D. Evans of the United States District Court for the Northern District of Georgia, in Civil Action No. 1:05-CV-01578-ODE-JFK, by order of March 13, 2007 (Docket # 24) adopted the Report and Recommendation (Docket # 19) of the Honorable Janet F. King, United States Magistrate Judge. Judge Evans' order, in adopting the Report and Recommendation, denied Petitioner's Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2253.

On March 22, 2007, the Petitioner filed a Motion for Reconsideration of the Judge Evans' order of March 13, 2007 and, in the alternative, for a Certificate of Appealability. On April 16, 2007, Judge Evans denied the Motion for Reconsideration and the Motion for Certificate of Appealability.

Petitioner timely applied for a Certificate of Appealability to the United States Court of Appeals for the Eleventh Circuit which on July 16, 2007 was denied in an order by Judge Hull. The Petitioner's Petition for Reconsideration was denied by the Court of Appeals for the Eleventh Circuit on September 6, 2007 for which Petitioner seeks that a Writ of Certiorari be issued because of the need for a comprehensive decision that necessary elements of an offense cannot be presumptively mandated by jury instruction.

REASONS FOR GRANTING THE PETITION

THE TRIAL COURT EFFECTIVELY INSTRUCTED THE JURY TO PRESUME "FORCE,"WHEN, IN FACT, NO "FORCE" WAS PROVEN. "PRESUMPTION," IN THIS MANNER, OF A SUBSTANTIVE ELEMENT OF A CRIMINAL OFFENSE VIOLATES THE FOURTEENTH AMENDMENT

The Eleventh Circuit has decided an important United States constitutional question that conflicts with other Circuits as well as being in conflict with *Sandstrom v. Montana,* 442 U.S., 510, 524 (1979), providing the controlling constitutional standard with respect to evidentiary jury instructions in state criminal matters: "A state must prove **every ingredient of an offense** beyond a reasonable doubt, and . . . **may not shift the burden of proof** to the defendant" by means of a presumption. [Emphasis supplied.] Judge Hull's initial decision avoided the mandate of *Sandstrom* by finding that the Petitioner "failed to demonstrate fundamental unfairness." Order at 5-6. However, there can be no more fundamental unfairness than to convict and imprison a citizen in violation of the constitutional requirement of proof beyond a reasonable doubt.[2]

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[2] "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of ***every fact*** necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S.

As comparison with *Sandstrom* makes clear, the issue in the present case is ***not*** that the jury was allowed to render a verdict without a finding on the issue of force.[3] In *Sandstrom,* the jury was erroneously allowed to find "intent" from the traditional civil instruction that the "law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 512. Here, the traditional instruction as to appropriate methods of proof (direct or circumstantial evidence), when coupled with a conclusion from the bench concerning "fear," allowed the jury to find "force" in the same improper manner than the *Sandstrom* jury found "intent."[4] Within the

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358, 364 (1970) [Emphasis supplied by the Court in *Sandstrom* at 520].

[3] This Court stated, in its initial opinion: "Indeed, the jury charge did not allow jurors to presume force, but instead, expressly required proof." (Order at 6.) However, the invitation to the jury to employ "circumstantial" evidence, in the context of this trial record, and the trial court's stated finding of "fear" on the part of the victim, required the jury to find "force." The trial court effectively created a presumption of force from the fact that the Petitioner was an on-duty law enforcement officer.

[4] It does not, in Petitioner's view, add to the logical force of the initial decision to note: "In addition, Georgia law has defined 'force' as including intimidation." (Order at 6.) This is surely a correct statement of Georgia law, but, as noted below, there is no more direct evidence of "intimidation" than there is of physical "force." See *infra.* Both "intimidation" and "force" must, necessarily, be found only from the fact that the Petitioner was a law enforcement officer: there was no direct evidence of either element.

four corners of the trial record, there was absolutely no direct evidence of forced sodomy; thus, the verdict of guilty cannot logically stand unless supported by an unconstitutional presumption.

Mr. Justice Brennan, writing for a unanimous Supreme Court in *Sandstrom*, observed that the constitutionality of instructions raising issues of mandatory presumption (as opposed to permissible inference) "requires ***careful attention to the words actually spoken to the jury*** ... , for whether a defendant has been accorded his constitutional rights depends upon the way in which ***a reasonable juror could have interpreted the instruction."*** *Id.* at 514. [Emphasis supplied.] Such "careful attention" to the "actual words" in the present case shows that after introducing the method of circumstantial proof, the county magistrate offered what was, effectively, a comment on the evidence—"induced by fear." The jury was told that lack of resistance, "induced by fear," which is found to exist, "***is force.***" [Emphasis supplied.] A "reasonable juror could easily have viewed such an instruction as mandatory." *Id.* at 515.

The jury was not told that it had a choice as to the existence *vel non* of "fear." It was told that there was "fear," and that "fear" equaled "force." A presumption, in contrast to an inference, is a set of facts that must be found from another fact or group of facts. Under the questioned instruction, once the jury was told that there was "fear," there had to be a finding of "force." Indeed, by asserting "fear" and holding it to be a predicate of "force," the trial court

created a conclusive or irrebuttable presumption that shifted the burden of proof to the Petitioner. Such a shift of the burden of proof and the burden of persuasion violates the Fourteenth Amendment.

McCleskey v. Zant, 580 F. Supp 338, 383 (N.D. Ga. 1984) summarized the constitutional prohibition against presumptions: "***Jury instructions*** which relieve the prosecution of this burden or ***which shift to the accused the burden of persuasion on one or more elements of the crime are unconstitutional.***" [Emphasis supplied.] That is precisely the effect of the challenged instruction. The county magistrate instructed the jury to presume force by making it equivalent to the victim's "fear," regardless of the actions of the Petitioner. The charge also merges lack of consent and force to presume both without further proof of these necessary elements of the crime.

Judge Hull's initial decision observes, "[s]tate court jury instructions ordinarily comprise issues of state law ... ." (Order at 5.)[5] Therefore, it is significant that the Georgia appellate authorities are supportive of Petitioner's request for reconsideration. For example, *Franklin v. State,* 245 Ga. 141 (1980), instructs:

> Whenever a definition is given in a charge, the effect is superficially like

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[5] State law, and State appellate courts, is the final arbiters of substantive state law, but, as *Sandstrom* holds, state appellate courts are "not the final authority on the interpretation which a jury could have given the instruction." 442 U.S. at 516.

> that of a conclusion, in that once the jury finds all the elements of the definition beyond a reasonable doubt, they have necessarily found the defined term. ... ***Whereas a presumption establishes a presumptive equivalency which may be artificial or fictitious, with the jury being 'Authorized or required to find the one from the other.'*** [Emphasis supplied.]

The coupling of the traditional "circumstantial evidence" instruction, in the factual context of the present case, with the comment concerning "[l]ack of resistance, induced by fear," created such a presumption. The jury was relieved of the burden of finding that there was, in fact, force. The jurors were authorized, from the bench, to find "force" from the victim's self-described "fear." This approach violates cases such as *Drake v. State*, 239 Ga. 232, 236 (1977), which "segregated the issue of force as a separate element, which must be shown and cannot be presumptive for any reason." [6]

The constitutional infirmity of the challenged instruction is that it would find "fear" and, thus,

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[6] The jury charge actually given by the presiding magistrate was taken from *Long v. State*, 241 Ga. App. 370, 371 (1999); *Ingram v. State*, 211 Ga. App. 252, 253 (1993); and *Parker v. State*, 162, Ga. App. 27 (1982). This statement of the law has now been superseded by the Georgia Supreme Court's decisions in *Luke v. Battle*, 274 Ga. 370 (2002), *Brewer v. State*, 271 Ga. 605, 608 (1999); and *State v. Collins*, 270 Ga. 42, 45 (1998), all of which require that the element of force must be proven.

"force" in any circumstance in which a uniformed, on-duty law enforcement official engages in sexual activity with a member of the public. To create such a presumption is to violate Due Process.

2. THERE WAS NO EVIDENCE TO SUPPORT A JUDICIAL FINDING OF "FORCE," A "THREAT OF FORCE," OR "INTIMIDATION" *BY THE PETITIONER*. SUCH A FINDING IS A NECESSARY ELEMENT OF THE CRIME OF AGGRAVATED SODOMY

The constitutional infirmities of the jury charge loom large, precisely because there is no other logical avenue, other than such a mandated presumption, by which the jury could have reached a verdict of guilty. Therefore, Petitioner's conviction must be reversed for the more fundamental reason that there was no record evidence of the "aggravated" crime. *Jackson v. Virginia*, 443 U.S. 307 (1979), holds that a state conviction cannot stand where there is a want of evidence of a necessary element of the offense.

On this core issue, it is apparent that reasonable jurists can disagree with the decision of the Circuit Judge. Indeed, the Superior Court of Muscogee County granted a writ of habeas corpus, because after hearing and a review of the entire record, "no force, threat of force or intimidation of force" was found. Specifically, Judge Johnston found that, "upon review of the transcript of the Petitioner's trial, the Court finds that there was *no evidence of force, threats of force or intimidation of force proven at* the Petitioner's *trial* and *the*

complaining witness was never under arrest or in custody" (Conclusions of Fact, No. 6.) [Emphasis supplied.] Notwithstanding subsequent reversals, this holding of the habeas court shows that there is a reasonable dispute that should satisfy the standards for appealability.

The Eleventh Circuit's initial decision correctly states that "Georgia law does not require proof of physical force. ... Rather, 'force' has been defined to include 'acts of physical force,' as well as 'threats of death or physical bodily harm, or mental coercion, such as intimidation." (Order at 2.) However, the relevance of the supporting case law for these forms of "force" is unclear, because there was absolutely *no* proof of non-physical force. There was absolutely *no* proof of "mental coercion." There was absolutely *no* proof of "threats of death or physical harm." There was simply the undisputed evidence (Order at 3) that the Petitioner was in uniform, in his patrol car, on-duty, and had given the victim a citation for an expired driver's license.

The appropriate test of appellate review in this Circuit is articulated in *Conklin v. Schofield*, 366 F.3d 1191 (11th Cir. 2004). If, during a habeas corpus review, the Court determines that a rational jury (a) could not have found the essential elements of the crime beyond a reasonable doubt, (b) while viewing the evidence in the light most favorable to the State, the writ must be granted.

Applying this standard to the case at bar, the Circuit Judge acknowledges, *sub silentio*, in the initial decision that there were no acts of physical

force, or coercion, or threats of death or physical harm.[7] Rather, Judge Hull finds: "The record supports the state court's finding that force was sufficiently proven to the jury based on *intimidation*." (Order at 2.) [Emphasis supplied.] However, the opinion of the Circuit Judge misapprehends both the legal nature of the "intimidation" that should have been assessed by the jury and the quantum of evidence in support of that standard.

The Legal Elements of "Intimidation" as an Aggravating Circumstance

Petitioner respectfully submits that, upon examination of the definitional case law, in Georgia, a finding here of "force" by "intimidation" is a logical fallacy, a tautology. "Intimidation" must be composed of words or actions of the defendant that places a person of ordinary sensibilities in fear of harm, and there were no such "words or actions" by this defendant.

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[7] United States Magistrate Judge King, in her Report and Recommendation, attempted to construct "force" from the testimony of the victim that the Petitioner "guided" her head during her performance of oral sex; however, this conclusion is directly contradicted by the victim's own testimony. When the Petitioner put his arm around her for oral sex, "there wasn't any forcefulness about it when he put his hand back there" [Trial Tr. 859]. This claimed indicium of "force" is not adopted by the Circuit Judge's opinion.

Shehany v. Towery, 170 Ga. 70 (1930), is still the law of Georgia. It instructs: "***Intimidation*** as it relates to law has a different meaning and ***consists in part of putting a person in fear in some way, citing words or phrases with force and arms, i.e. a gun or knife.*** It is the use of ***physical violence or threats to influence the conduct or to compel the consent of another.***" [Emphasis supplied.]

The more recent authority of *Patterson v. State*, 242 Ga. App. 885 (2000), is in accord. Relying upon the Supreme Court's opinions in *Brewer v. State*, 271 Ga. 605, 608 (1999) and *State v. Collins*, *supra*, *Patterson* reiterates that "***[f]orce*** is shown if the ***defendant's words or acts*** were sufficient to instill in the victim ***a reasonable apprehension of bodily harm***, violence, or other dangerous consequences to herself or others." [Emphasis supplied.]

Thus, the concept of "intimidation" as a conceptual proxy for "force" must be made up of the "***words or acts***" of "***the defendant.***" There is no room in this very serious criminal standard for the mental impressions of the victim, the psychological pain of the victim, or the emotional turmoil of the victim, unless those impressions, pain, and turmoil are hinged to "***words or acts***" of the "***defendant.***" The defendant, however improper his conduct may have been in a broad sense, cannot, as a matter of law, be held in aggravation by "force" because of fear instilled from some other source, such as threats of spousal violence.

The Body of Evidence Demonstrating "Intimidation"

Three pieces of testimony are cited by Judge Hull as supportive of "intimidation." Each is examined below, against the Georgia judicial definitions of "intimidation."

(a) *A "Fear."* The victim testified that she "was scared because it was dark and nobody was around." Order at 3. Putting aside the apparent unreasonableness of this fear, in light of the victim's prior romantic assignation, at this same "dark" location, it is obvious that nothing done by the Petitioner created this fear.

The victim's approach to the Petitioner's patrol car was, without dispute, voluntary. In fact, the Complainant stood so close as to the Petitioner as to cause him to be unable to exit the vehicle freely: "[A] one point, a truck drove into the parking lot, and he said, excuse me. So I backed up so he could get out of the car" (Tr., p. 423).

The evidentiary record is totally at odds with an inference of fear: "There was just ***idle conversation between the two of us*** ... ." *Id.* [Emphasis supplied.] Such "idle conversation" stands in stark contrast to the communications found in *Brewster v. State,* 261 Ga. App. 795 (2003) to constitute "intimidation induced by fear." In *Brewster* the victim was physically and verbally threatened: "Shut up, or I'll kill you." See, also, *Evans v. State,* 266 Ga. App. 405 (2004). There were no threatening

words or acts ***by the defendant*** in the case now under review. The fear that existed in the victim was apparently instilled by her spouse. She testified that he "always told [her] that if [she] ever cheated on him with another man he would slit [her] from ear to ear" (Tr. p. 442).[8]

(b) *A "Feeling."* The victim testified that she "felt like she had no choice." Order at 3. Again, putting aside the apparent unreasonableness of this feeling, because the victim was, in fact, free to leave the Petitioner's immediate area, it is obvious that the Petitioner did nothing to generate this feeling. Through no words or actions, did he suggest that the victim had no choice but to participate in sodomy. Assuming that the Petitioner made "sexual advances toward her" (Order at 3), what words or actions of the Petitioner converted the resulting sex act to aggravated sodomy? There are none in the record.

According to the victim's testimony, she exited her vehicle and approached the Petitioner's patrol car on her own: "And then I got out of the car and I went over to the police officer." (Tr., p. 410). She "leaned into the car" several times, initiating close contact with the Petitioner "because I didn't think I could get much closer than what I was, ***so I stuck my head in the car***." (Tr., p. 419). [Emphasis supplied.] It is logically impossible to square such testimony with an evidentiary finding that the victim had no "choice."

[8] In his closing argument at trial, the Assistant District Attorney confirmed the victim's fear of her husband. She was "[a]fraid of her husband on the way at the moment." (Tr. p. 1119).

There are, in fact, numerous "choices" reflected in this testimony, but none of them were inhibited by the words or acts of the Petitioner.

(c) *A "Belief."* Finally, according to the Circuit Judge, the victim "***believed*** that if she attempted to fight Petitioner, she would have been 'hurt.'" Order at 3. [Emphasis supplied.] This observation echoes dicta of the Georgia Supreme Court, in its reversal of the grant of the writ by the habeas court. It refused to apply the "miscarriage of justice" procedural exception in order to allow habeas review after an unsuccessful extraordinary motion for new trial. The Supreme Court stated that even if the exception were applied, habeas would not be proper. "[T]he victim testified that she submitted to Stinson's desires because she ***believed*** that if she did not, he would physically hurt her, which, in the context of Stinson's words and actions, constituted a reasonable fear." *Thompson v. Stinson*, 279 Ga. 196 (2005) [Emphasis supplied.]

Again, however, no "word or action" of the Petitioner can be cited by the Circuit Judge or the Georgia Supreme Court to support the victim's "belief." The Supreme Court referred to "the context" of the defendant's "words and actions," because there are no aggravating "words or actions" from him. The court's dicta acknowledge that there must be an implication from "context," in order to find force. Such an implication is contrary to the court's own holdings requiring direct proof of the aggravating elements of the charged crime.

In the case *sub judice*, "intimidation," resulting in a conviction for aggravated sodomy, rests uneasily on one fear, one feeling, and one belief. Each of these internal, subjective mental conclusions was admittedly generated by the complainant. Whatever formative forces created the fear, the feeling, and the belief, they did not come from the Petitioner, other than by reason of his presence at the scene, his status as a police officer, and his alleged "sexual advances."

The "intimidation" is apparently found, by the Circuit Judge, in the status of the Petitioner. He was in uniform, with a badge, a radio, and a holstered side-arm that never was touched or threatened. But the Petitioner's ***status***, cannot constitute "force" in aggravation of sodomy. "Intimidation" cannot be created by attribution or presumption. There must be "acts or words" of "the defendant" in evidence. This is made clear by *Luke v. Battle*, *supra*, where "the victim testified that 'he was not forced' to do the acts in question, but that 'he did not want to do them'" *Id.* at 371, n3. In weighing such evidence, the Georgia Supreme Court looked to the United States Supreme Court's decision in *Bousley v. United States*, 523 U. S. 614 (1998) and to its own decision in *Scott v. Hernandez-Cuevas*, 260 Ga. 466 (1990). *Id.* at 371.[9]

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[9] The United States Supreme Court in *Bousley* required the government to show an active employment of a firearm such as brandishing in order to show "force." Mere possession was not sufficient to satisfy the element of physical force. *Id.* at 617. Similarly, the Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004),[9] held that the proscribed "use... of physical force" requires active employment of a weapon.

Luke v. Battle, *Brewer v. State*, *supra*, and *Hines v. State*, 173 Ga. App. 657 (1985) are cases of aggravated sodomy involving minors, and, thus, factually distinguishable, case, but their constitutional holdings are directly applicable.[10] A conviction for aggravated sodomy must be reversed unless the element of force is proven by the State, and "force" cannot be presumed or derived by attribution from the defendant's status.

CONCLUSION

When there is constitutional error with regard to jury instructions and there is grave doubt about whether the error had a "substantial and injurious effect or influence in determining the jury's verdict, the error is not harmless, and the Petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436-445 (1995). The jury instruction here is no less debatable than the instruction in *Sandstrom*, which was unanimously found to violate the Fourteenth Amendment. This case involved the broad constitutional question that should put meaning into Due Process that necessary elements of an offense cannot be mandatory presumed by a trial court's jury instruction and proof of the necessary elements dispensed with for conviction of a criminal offense.

With respect to the sufficiency of the evidence to support this conviction, core concepts of Due

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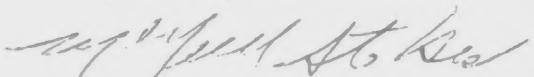
[10] Analysis of *State v. Collins*, *supra*, *Brewer v. State*, *supra*, and *Luke v. Battle*, *supra*, demonstrates the strength of this constitutional principle in that it was held to apply retroactively, as a change in the substantive law.

Process prevent "intimidation" by attribution. The element of "force," in the commission of the crime of sodomy, cannot be found absent "words or acts" of the defendant and cannot be attributed from the fact that a police uniform was worn by one of the participants and certainly cannot be supplied by a mandatory jury instruction mandating the jury to presume the necessary element of force.

Respectfully Submitted,



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No. _____

In The Supreme Court of the United States

JAMES TERRY STINSON,

Petitioner,

v.

THOMAS AMMONS, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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FILED SEP 06 2007

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 07-12293-H

JAMES TERRY STINSON,

Petitioner-Appellant,

versus

THOMAS AMMONS,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

Before DUBINA and MARCUS, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated July 16, 2007. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2); Strickland v. Washington, 466 U.S. 668,697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984); Conklin v. Schofield, 366 F.3d 1191, 1200 (11th Cir. 2004); Mills v. Singletary, 161 F.3d 1273, 1287(11th Cir. 1998); Walker v. Jones, 10 F.3d 1569, 1572(11th Cir. 1994); Jones v. Kemp, 794 F.2d 1536, 1540(11th Cir. 1986); Brewster v. State, *584* S.E.2d 66,69 (Ga.App. 2003).

FILED JUL 16 2007

IN THE UNITED STATES COURT OF APPEAL

FOR THE ELEVENTH CIRCUIT

No. 07-12293-H

JAMES TERRY STINSON,

Petitioner-Appellant,

versus

THOMAS AMMONS,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

ORDER:

Appellant seeks a certificate of appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 petition. In his § 2254 petition, appellant claimed that: (1) he was not guilty as a matter of law based

on insufficient evidence; (2) counsel was ineffective for (a) having a conflict of interest, and (b) filing to move for a judgment of acquittal; and (3) his jury instructions were unconstitutional. The district court denied appellant's § 2254 petition. In his motion before this Court, appellant additionally asserts that: (1) his indictment was insufficient and illegal; and (2) counsel was ineffective for failing to (a) challenge the sufficiency and legality of the indictment, (b) present video tapes of witnesses, and (c) obtain all relevant evidence from the state.

In order to obtain a COA a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In determining whether to grant a COA, the appellate court should "look to the District Court's application of the [Antiterrorism and Effective Death Penalty Act of 1996] to the petitioner's constitutional claims and ask whether that resolution was debatable among jurists of reason. This threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims. In fact, the statute forbids it." Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003).

In Claim 1, appellant argued that there was insufficient evidence to support his aggravated sodomy conviction because there was no evidence of force. Under Georgia law, aggravated sodomy occurs if an individual "commits sodomy with force and against the will of the other person." O.C.G.A. § 16-6-2(a)(2). Appellant is correct that Georgia courts require proof of the separate element of "force"; however, Georgia law does not require proof of

physical force. See Brewer v. State, 523 S.E.2C1 18, 19-20 (Ga. 1999) (holding, in the context of underage victims, that "force is a separate essential element which the State is required to prove to obtain a conviction for aggravated sodomy"). Rather, "force" has been defined to include "acts of physical force," as well as "threats of death or physical bodily harm, or mental coercion, such as intimidation." Id. at 20; see also Brewster v. State, 584 S.E.2d 66, 69 (Ga. Ct. App. 2003) (finding sufficient evidence to support aggravated sodomy conviction where the defendant was a stranger who entered victim's home and initiated sexual contact, and the victim testified that she did not resist because she was afraid).

The record supports the state court's finding that force was sufficiently woven to the jury based on intimidation. See Conklin v. Schofield, 366 F.3d 1191, 1200 (11th Cir. 2004) (explaining that when reviewing sufficiency of the evidence allegations in a habeas corpus case, this Court "ask[s] whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt") (quotations and citations omitted). The victim testified that she: (1) was scared because it was dark and nobody was around; (2) felt like she had no choice; and (3) believed that if she attempted to fight appellant, she would have been "hurt." The record further reveals that appellant was an on-duty Gwinnett County police officer, in uniform and armed, who had presented the victim with a citation just prior to making sexual advances toward her. Thus, the record supports the jury's finding of guilt, and this issue is not debatable.

In Claim 2(a), appellant claimed that counsel was ineffective based on a conflict of interest. A criminal defendant is entitled to conflict-free representation. Cuyler v. Sullivan, 446U.S. 335, 346, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333 (1980). To establish ineffective assistance based on a conflict of interest, a criminal defendant must demonstrate (1) an actual conflict of interest that (2) adversely affected counsel's performance. Herring v. Sec. v. Dep't of Corr. 397 F.3d 1338, 1357 (11th Cit 2005). An actual conflict exists when counsel has "inconsistent interests." Pegg v. United States, 253 F.3d 1274, 1277 (11th Cir. 2001). A petitioner "must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action." Mills v. Singletarv. 161 F.3d 1273, 1287 (11th Cit 1998).

> To prove adverse effect, a [defendant] must satisfy three elements. First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. . . . Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

In Claim 2(b), appellant claimed that counsel was ineffective for failing to move for a judgment of acquittal, or to raise the issue on appeal, based on the state's failure to prove the required element of

force. A defendant claiming ineffective assistance of counsel must demonstrate both professional error and prejudice to the outcome of the proceedings, and the failure to demonstrate either is dispositive of the claim against the petitioner. Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984). In determining whether counsel gave adequate assistance, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690, 104 S.Ct. at 2066. Prejudice is a "reasonable probability that, but for counsel' s unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068. As discussed above, the state court properly found sufficient evidence of force as required by Georgia law. Therefore, counsel did not err by failing to move for a judgment of acquittal on this meritless basis. See Strickland, 466 U.S. at 694, 104 S.Ct. at 2068; see also Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir. 1984) (noting that appellate counsel need not brief issues that are reasonably considered to be without merit).

In Claim 3, appellant argued that his jury charge was unconstitutional. The jury charge stated, in part, "Force may be proved by circumstantial or direct evidence. Lack of resistance, induced by fear, is not legally cognizable consent but is force." Appellant claimed that this language allowed the jury to presume force, which was impermissible according to Georgia cases requiring separate proof of the element of force. "State court jury instructions ordinarily comprise issues of state law and are not subject to federal habeas corpus review absent

fundamental unfairness." Jones v. Kemp, 794 F.2d 1536,1540 (11th Cir. 1986). Appellant has failed to demonstrate fundamental unfairness. Indeed, the jury charge did not allow jurors to presume force, but instead, expressly required proof. In addition, Georgia law has defined *"force"* as including intimidation. See Brewer, 523 S.E.2d at 20; see also Brewster, 584 S.E.2d at 69 (stating that, "[l]ack of resistance, induced by fear, is force"). Therefore, this claim is not debatable.

Appellant now asserts, for the first time, additional ineffective assistance of counsel claims, as well as a claim challenging the sufficiency and legality of his indictment. These newly asserted claims have not been considered by this Court, however, because they were not raised in the district court. See Walker v. Jones, 10 F.3d 1569, 1572 (11th Cir. 1994) (noting that "an issue not raised in the district court [in a petition for writ of habeas corpus] and raised for the first time in an appeal will not be considered by this [C]ourt") (quotations and citation omitted).

Accordingly, Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C § 2253(c)(2).

s/Frank Hull
Frank Hull
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
GEORGIA
ATLANTA DIVISION

JAMES TERRY STINSON,

Petitioner

v. CIVIL ACTION
NO. 1:05-CV-1578-ODE

THOMAS AMMONS, WARDEN

Respondent

ORDER

This civil case is currently before the Court on the Final Report and Recommendation ("R&R") of Magistrate Judge Janet F. King, (Doc. 19] filed on October 10, 2006 and Petitioner's Motion for Oral Argument of Petitioner's Objections to Magistrate Judge's Report and Recommendation [Doc. 21] Magistrate Judge King recommended denying Petitioner's Petition for Writ of Habeas Corpus [Doc. 1]. On October 23, 2006, Defendant timely filed objections to the R&R. [Doc. 2d]. Petitioner also filed a motion requesting oral argument on his objections. Petitioner is challenging the constitutionality of his June 29, 2001 aggravated sodomy conviction in the Superior Court of Gwinnett County.

Pursuant to 28 U.S.C. § 636(b)(1)(C), this

Court must conduct a de novo review as to those portions of the R&R to which Petitioner timely and specifically objected. As Judge King stated in the Order for Service of the R&R, all objections "shall specify with particularity the alleged error[s] made (including reference by page number to the transcript if applicable. 11 In other words, "when a party makes a timely and specific objection to a portion of the Report and Recommendation, the district court is obliged to engage in a de novo review of the issues raised on objection." Tauber v. Barnhart, 438 F.Supp.2d 1366, 1373 (N.D.Ga. 2006) However, should a party fail to offer specific objections, the Court is not required to apply de novo review and may "accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge[,]" applying a clearly erroneous standard. Id., United States v. Raddatz, 447 U.S. 667, 673-74 (1980).

Petitioner's objections consist almost entirely of complete paragraphs that have been transposed from his earlier filings. There has been some attempt at reorganizing the sequence of paragraphs, but almost no original argumentation has been offered. Petitioner is primarily requesting that the Court simply reconsider the motions that were already considered by Magistrate Judge King without specifically objecting to the vast majority of Magistrate Judge King's findings and recommendations. Petitioner has repeated the same three grounds for habeas relief on which he relied in his state habeas proceedings and in the motions before Magistrate Judge King:

(1) Petitioner is not guilty as a matter of

law because the State did not prove the necessary element of force for a conviction [for] aggravated sodomy.

(2) Petitioner's counsel suffered under a conflict of interest and was ineffective in that he did not make a motion for acquittal because there was no force proven as a necessary element of aggravated sodomy.

(3) The trial court gave an erroneous jury charge that ... merged lack of consent and force resulting in an unconstitutional conviction instructing that the Petitioner could be convicted of aggravated assault [sic] without proof [of] the necessary element of force.

The Court is not required to undertake de novo review of the general requests for review of Petitioner's initial motions. Tauber, 438 F.Supp.2d at 1373. Accordingly, the Court will primarily review the R&R to determine whether Judge King's recommendations are clearly erroneous. Under the clearly erroneous standard, the Court will reject Judge King's recommendations "if, after viewing all the evidence, [the Court is] 'left with the definite and firm conviction that a mistake has been committed.'" HGI Assocs.,Inc .v. Wetmore Printing CO., 427 F.3d 867, 873 (11th Cir. 2005) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

The only specific objection to the R&R that the Court can identify is that the R&R "erroneously equates lack of consent with force and erroneously equates the alleged victim being intimidated with intimidation of force." Objections, p.3. This alleged

misunderstanding of the law governing aggravated sodomy, and a corresponding misapplication of the law to the facts is the only aspect of the R&R that is subject to de novo review.

The written record is sufficiently developed to permit the Court to rule on the R&R without holding oral argument. Accordingly, Petitioner's Motion for Oral Argument of Petitioner's Objections to magistrate Judge's Report and Recommendation [Doc. 21] is DENIED. Furthermore, for the following reasons, the R&R [Doc. 19] is ADOPTED. Petitioner's Petition for Writ of Habeas Corpus [Doc. 1) is DENIED.

I. Procedural Background

The R&R contains a summary of the pertinent background of the case, and this summary is reproduced below.

A. Trial proceedings

On June 24, 1998, a Gwinnett County grand jury returned a seven-count indictment against Petitioner, charging him with (1) one count of aggravated sodomy and three counts of sexual battery upon Ms. Katharine Davis[1] on February 15, 1998 (Counts 1-4); (2) two counts of sexual battery upon Ms. Kristen Ann Vick on February 13, 1998 (Counts 5-6); and (3) one count of violating his oath as a Gwinnett County police officer on February 15,

[1] By the date of trial, Ms. Davis was divorced and went by the name of Katharine Lentsch. [Resp't Ex. AA, Trial Tr.].

1998. (Count 7).[2] [Resp't Ex. AA, Appellate Record at 4-7]. On June 29, 2001, after a jury trial during which Petitioner was represented by defense counsel, Mr. Walt Britt, a Gwinnett County jury found Petitioner guilty on the aggravated sodomy count and on four of the five counts of sexual battery, acquitting him on one of the counts involving Ms. Vick. [Id. Appellate Record at 57 & Trial Tr.). Petitioner received a 20-year split sentence on the aggravated sodomy conviction, with 15 years to serve in prison and 5 years to serve on probation, along with 4 concurrent 1-year sentences of probation on the sexual battery convictions, for a total term of probation of 6 years. [Id. Appellate Record at 58].

B. Motion for a new trial and direct appeal

Still represented by Mr. Britt, Petitioner filed a motion for a new trial, claiming that the trial court erred in refusing to admit certain evidence and to given certain jury instructions related to the credibility of the two alleged victims. [Id. Appellate Record at 97-100]. After a December 7, 2001, hearing on the motion for a new trial [Resp't Ex. BB, Hearing

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[2] The State later dismissed Count 7. [Resp't Ex. AA, Appellate Record at 52]. Prior to trial, the court granted Petitioner's motion to suppress two videotaped interviews that he had given to Gwinnett County investigators on February 17 and 20, 1998, regarding the alleged events of February 15, 1998 . See State v. Stinson, 536 S.E.2d 293, 294 (Ga. Ct. App. 2000). In an interlocutory appeal, the Georgia Court of Appeals reversed the trial court's order and ruled the videotapes admissible. Id. at 295-96. In the first interview, Petitioner denied having had any sexual contact with Ms. Davis, but in the second, he admitted the contact, but described it as consensual. [Resp't Ex. BB, Trial Tr. 606-88, 899-922]. The admission of this evidence is not at issue herein.

Tr.], the trial. court denied the motion, noting that there was sufficient evidence to convict Petitioner beyond a reasonable doubt pursuant to the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979) . [Resp't Ex. AA, Appellate Record at 108-1101. Still represented by Mr. Britt, Petitioner filed a notice of appeal, raising claims similar to those he had raised in his motion for a new trial. [Resp't Ex. AA, Appellant's Br. at 13] The Georgia Court of Appeals summarized the evidence with respect to Ms. Davis as follows:

> State's evidence showed that in the early morning hours of February 14, 1998,[3] the complaining witness, K.D. [Ms . Davis], was sitting in a car in the parking lot of a supermarket. She was there with a man with whom she had previously worked and had an affair. Stinson [Petitioner], a uniformed Gwinnett County police officer, appeared on the scene and decided to investigate. After discovering that K.D.'s driver's license had been suspended, Stinson instructed her male companion to leave. While detaining K.D., Stinson sexually battered her in various ways and forced her to perform oral sex. Following this incident, K. D. and her husband divorced. Stinson's defense was that his sexual contact with K.D. was consensual.

Stinson v. State, 569 S.E.2d 858, 860 (Ga. Ct. App. 2002). The court denied Petitioner's appeal, noting, inter alia, that "the [trial] court did not err in

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[3] Actually, by the time of the events in question, it was February 15, 1998. [See Resp't Ex. AA, Appellate Record at 4-7].

refusing to instruct the jury that it should consider [Ms. Davis's] character in determining whether the sexual contact with [Petitioner] was consensual or against her will." Id. at 861.

C. Extraordinary motion for a new trial

On March 4, 2003, represented by new counsel, Mr. McNeill Stokes, Petitioner filed an extraordinary motion for a new trial. [Resp't Ex. A]. Petitioner alleged the discovery of new evidence indicating his innocence, namely, the "systemic conflict of interest" of his former counsel, Mr. Brie., arising from Mr. Brie's prior representation of Gwinnett County. Petitioner argued that this conflict inhibited Mr. Britt's defense of him because, in exchange for Petitioner's conviction, Ms. Davis had offered to, and later did, dismiss her civil lawsuit against Gwinnett County for damages arising from Petitioner's alleged crimes against her. [Id. §§ 1-3]. .Petitioner argued that prejudice arising from this conflict was presumed as a matter of law and that, moreover, he was actually prejudiced by Mr. Britt's failure to move for acquittal on the aggravated sodomy charge based on the lack of evidence that Petitioner had used force against Ms. Davis. [Id. §§ 3-5]. Petitioner also claimed that he was prejudiced by Mr. Britt's failure to object to the following jury instruction: "Lack of resistance, induced by fear, is not legally cognizable consent but is force." Petitioner argued that this instruction improperly "merge[d] the two separate necessary elements of lack of consent and force." [Id. § 6].

On March 7, 2003, the trial court summarily denied Petitioner's extraordinary motion for a new

trial, "without the necessity of a hearing, "because the motion "fail [ed] to show any merit on its face." [Resp't Ex. C at 1]. The court cited no caselaw to support its ruling on Petitioner's substantive claims, although it did cite Dick v. Stake, 287 S .E .2d 11, 13-14 (Ga. 1982) (setting forth the six requirements for prevailing on an extraordinary motion for a new trial based on newly discovered evidence). [Resp't Ex. C at 1]. Petitioner unsuccessfully sought leave to file a discretionary appeal of the trial court's order. [See Resp' t Ex. J & Exs. A-B attached thereto; Doc. 4 at 3-4; Doc. 10-2 at 3-4]. Throughout the proceedings on his extraordinary motion, Petitioner's only reference to federal constitutional law was his citation of Cuyler v. Sullivan, 446 U.S. 335 (1980), for the proposition that a defense attorney's systemic conflict of interest is never harmless. [See Resp' t Ex. B (Petitioner's Brief in Support of Extraordinary Motion for New Trial) at 4; Resp't Ex. D (Petitioner's Application for Discretionary Appeal) at 18; Resp't Ex. J (Petitioner's Petition for Writ of Certiorari) at 13]. Moreover, the only consideration, by any state court, of the merits of Petitioner's claims was the trial court's cursory conclusion that the extraordinary motion was meritless on its face. [See Resp't Ex. C at1; Resp't Ex. J, Exs. A-B].

D. State habeas proceedings

On October 17, 2003, still represented by Mr. Stokes, Petitioner filed a habeas corpus petition in the Superior Court of Muscogee County, raising the following three claims:

> (1) Petitioner is not guilty as a matter of law because there was no force or threat of force

> involved in [his] conviction for aggravated sodomy which is a necessary element under the controlling authority of O.C.G.A. § 16-6-2 and its interpreting law;
>
> (2) The charge of the Court [that] "Lack of resistance, induced by fear, is not legally [cognizable] consent, but is force" is erron[e]ous under the facts established at trial; and
>
> (3) [Petitioner's] former counsel had a conflict of interest because he had previously represented Gwin[n]ett County which was involved in a lawsuit with the alleged victim arising out of the same case and this conflict would have made a difference in the outcome of [Petitioner's] trial.

[Resp't Ex. M Part III]. Petitioner's only mention of a federal constitutional violation in his original Brief in Support of Application for Habeas Corpus was, once again, a reference to Cuyler. [Id. Supp. Br. at 12]. However, because the respondent "raised the defense" that Petitioner had expressed no "constitutional allegations" in his state habeas petition and supporting brief, Petitioner moved to amend his petition to allege that his conviction and incarceration were "in violation of the Due Process Clauses of the Georgia and United States Constitutions" and "of the right to counsel guaranteed under the Georgia and United States Constitutions. [Resp't Ex. 0 §§ 2, 4].

After a hearing on November 17, 2003 [Resp't Ex. Y], the state habeas court made the following

factual findings in an order dated May 27, 2004: (1) "there was no evidence of force, threats of force or intimidation of force proven at the Petitioner's trial[,] and the complaining witness was never under arrest or in custody," and (2) "Petitioner's trial and appeals [counsel], Walt M. Britt, had formerly represented Gwinnett County and . . . there was no waiver of a conflict when the complaining witness had filed a lawsuit against Gwinnett County[,] and [Mr. Britt] did not raise the issue of the lack of force which would have made a difference in the outcome of the Petitioner's trial." [Resp't Ex. R at 4]. Accordingly, the state habeas court granted Petitioner's request for relief with respect to his aggravated sodomy conviction and ordered a new trial on that charge. [Id. 5-6].

On appeal [see Resp't Exs. S-X], the Georgia Supreme Court reversed the state habeas court's ruling because Petitioner's habeas petition "was based on the same three grounds" that he had raised in his extraordinary motion for a new trial. Thompson v. Stinson, 611 S .E.2d 29, 30 (Ga. 2005).

> As the issues [Petitioner] raised in his petition for habeas corpus have already been presented to the trial court, where relief was denied, and as [he] has already had his appeal of that decision rejected by the appellate courts in the manner provided by [state] law, the habeas court should have dismissed the petition as procedurally barred.

Id. at 30-31 (citation omitted). The court rejected Petitioner's argument that the procedural bar should be lifted due to his "actual innocence," stating that

> even if that exception to the procedural bar rule is applied, it does not warrant the relief [Petitioner] sought in the habeas court; the victim testified that she submitted to [his] desires because she believed that if she did not, he would physically hurt her, which, in the context of [his] words and actions, constituted a reasonable fear.

Id. at 31 (citing Jackson v. Virginia, supra; Brewer v. State, 523 S.E.2d 18 (Ga. 1999)).

E. The instant federal habeas petition

On June 15, 2005, still represented by Mr. Stokes, Petitioner filed the instant federal habeas corpus petition in the United States District Court for the Middle District of Georgia, which court then transferred the petition here. [Docs. 1, 6-8]. Petitioner raises the same three grounds for relief that he raised in his state habeas petition;

(1) Petitioner is not guilty as a matter of law because the State did not prove the necessary element of force for a conviction [for] aggravated sodomy [Ground One];

(2) Petitioner's counsel suffered under a conflict of interest and was ineffective in that he did not make a motion for acquittal because there was no force proven as a necessary element of aggravated sodomy [Ground Two]; and

(3) The trial court gave an erroneous jury charge that . . . merged lack of consent and force resulting in an unconstitutional conviction

instructing that the Petitioner could be convicted of aggravated assault [sic] without proof [of] the necessary element of force [Ground Three].

[Doc. 1 § 12].

II. Sufficiency of Evidence of Force

Petitioner alleges that the state failed to provide any evidence at trial to support the Supreme Court of Georgia's statement that "the victim testified that she submitted to Stinson's desires because she believed that if she did not, he would physically hurt her." Thompson v. Stinson, 611 S.E.2d 29 (Ga. 2005). Petitioner alleges that the R&R improperly ignored the state habeas judge's finding of fact that "there was no evidence of force, threats of force or intimidation of force proven at the Petitioner's trial." [Resp. Ex. R, at 4].

A petition for federal habeas relief may be granted "if it is found upon the record evidence adduced at the trial no rational trig of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 313 (1979). As established in Jackson, a criminal defendant's due process rights are protected so long as "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. Accordingly, Petitioner's argument directed to the Supreme Court of Georgia's statement regarding the victim's fear, as well as his reliance on the findings of fact of the state habeas judge are irrelevant to the present petition for federal habeas relief. The relevant

inquiry for this Court is whether the evidence could lead a rational trier of fact to find that the essential elements of the crime of aggravated sodomy were proven beyond a reasonable doubt.

Pursuant to Georgia law, sodomy is defined as "any sexual act involving the sex organs of one person and the mouth of another." O.C.G .A § 16-6-2(a)(1) Aggravated sodomy occurs when one "commits sodomy with force and against the will of the other person." O.C.G.A. § 16-6-2(a)(2). Georgia case law has established that "force . . . means acts of physical force, threats of death or physical bodily harm, or mental coercion, such as intimidation." Brewer v. State, 523 S.E.2d 18, 20 (Ga. 1999); Blansit v. State, 546 S.E.2d 81, 82 (Ga. App. 2001); Brewster v. State, 584 S.E.2d 66, 69 (Ga. App. 2003). Furthermore, proof of force may be direct or circumstantial. Blansit, 546 S.E.2d at 82.

Petitioner relies heavily on Brewer. 525 S.E.2d 18 (Ga. 1999). In Brewer, the Supreme Court of Georgia overruled the presumption that "one who commits an act of sodomy against an underage victim is, without more, guilty of aggravated sodomy." Id. at 20. In other words, the existence of "force" is a separate element to the crime of aggravated sodomy that must be proven when the victim is underage. See Luke v. Battle, 565 S.E.2d 816, 819-20 (Ga. 2002). However, Brewer clearly reaffirms the well-established standard that " [t]he term 'force' or 'forcibly' means acts of physical force, threats of death or physical bodily harm, or mental coercion, such as intimidation ." Id. at 20.

In other words, "force" as an essential element

of the crime of aggravated sodomy may be proven through evidence of mental coercion, which includes intimidation. Petitioner consistently argues that the state failed to present evidence of "intimidation of force." While it is unclear what Petitioner believes would amount to "intimidation of force," it is clear that under Georgia case law intimidation can amount to force.

The evidence supports a finding that the victim was indeed intimidated by Petitioner. The victim testified that she was scared because, "[i]t was dark. There wasn't anybody else there." [Trial Tr. 428] . Furthermore, when asked why she didn't scream for help she said "[t]here was nobody there." Id. The victim also testified that she "didn't feel like [she] had any choice in the matter." [Trial Tr. 430]. Finally, Petitioner alleges that "a close reading of the transcript demonstrates that [the victim] was afraid of what her husband might do to her." [Obj. to R&R, 14-15]. While Petitioner is correct that the victim testified that she was scared of what her husband would do to her if he found out that she was cheating on him, [Trial Tr. 442], the victim also testified as to her fear of Petitioner. Specifically, the victim testified as follows:

Q: Why didn't you scream for help?
A: There was nobody there.
Q: Why didn't you fight him?
A: If I tried to fight, my husband would kill me, and he's a lot bigger than my husband. It would've been worse.
Q: It would have been worse?
A: Huh-huh.

Q: What did you think would happen if you tried to fight him?

A: Probably the same thing that happened with my husband.

Q: What's that?

A: Got hurt. [Trial Tr. 428-29]. In other words, the victim was afraid that Petitioner would hurt her if she resisted his sexual advances.

Based on the evidence presented at trial, the Court finds that "after reviewing the evidence in a light most favorable to the prosecution, [a] rational trier of fact could have found petitioner guilty beyond a reasonable doubt." Johnson v. Alabama, 256 F.3d 1156, 1172 (11th Cir. 2001). Accordingly, the Court ADOPTS Magistrate Judge Walker's recommendation as to Petitioner's claim of insufficiency of evidence.

III. Ineffective Assistance of Counsel

Petitioner claims that his trial and initial appellate counsel, Walter M. Britt, had a conflict of interest based on prior representation of Gwinnett County. Britt failed to disclose his past representation of the county to Petitioner. Furthermore, Petitioner argues that the conflict caused actual prejudice because the complaining witness, Ms. Davis, allegedly agreed to drop a civil lawsuit against Gwinnett County in exchange for a conviction of Petitioner. According to petitioner, this alleged arrangement led to Britt's failure to move for acquittal, or appeal Petitioner's conviction, based on insufficient evidence of force.

In evaluating a claim of ineffective assistance of trial counsel, a court determines "whether, in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S. 668, 690 (1984). The other necessary component of an ineffective assistance of counsel claim is prejudice, or a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. On appeal, failure to raise a claim amounts to prejudice when "the neglected claim would have a reasonable probability of success on appeal." Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991). When alleging prejudice based on conflict of interest, the Supreme Court has held that, "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v . Sullivan, 446 U.S. 335, 350 (1980).

Petitioner raises no new arguments related to this ground for relief and the Court finds no clear error in Magistrate Judge King's analysis. Accordingly, the Court ADOPTS Magistrate Judge King's recommendation as to Petitioner's claim of ineffective assistance of counsel.

IV. Misleading and Improper Jury Instructions

Petitioner alleges that the trial judge improperly instructed the jury by stating that, "[l]ack of resistance, induced by fear, is not legally

cognizable consent but is force." According to petitioner, this instruction "likely misled the jury to convict Petitioner without the necessary element of force being proven." Under Eleventh Circuit precedent, "improper jury instructions can never be the basis for federal habeas corpus relied unless the instruction rendered the whole trial so unfair as to amount to a denial of due process." Jones v. Dugger, 888 F.2d 1340, 1343 (11th Cir. 1989).

Petitioner raises no new arguments related to this ground for relied and the Court finds no clear error in Magistrate Judge King's analysis. Accordingly, the Court ADOPTS Magistrate Judge Walker's recommendation as to Petitioner's claim of improper jury instructions.

V. Conclusion

For the foregoing reasons, Petitioner's Motion for Oral Argument of Petitioner's Objections to Magistrate Judge's Report and Recommendation [Doc. 21.] is DENIED. Furthermore, the R&R [Doc. 19] is ADOPTED. Petitioner's Petition for Writ of Habeas Corpus [Doc. 1] is DENIED. The instant action is DISMISSED.

SO ORDERED, this 13 day of March, 2007.

s/Orinda D. Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

FILED OCT 10, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
GEORGIA
ATLANTA DIVISION

JAMES TERRY STINSON,
Inmate # GDC 1086820,

Petitioner,

v. CIVIL ACTION NO.
1:05-CV-1578-ODE-JFK

THOMAS AMMONS, PRISONER HABEAS
Warden, CORPUS 28 U.S.C. § 2254

Respondent.

MAGISTRATE JUDGE'S ORDER AND FINAL REPORT AND RECOMMENDATION

Petitioner, an inmate at Lee State Prison in Leesburg, Georgia, seeks via 28 U.S.C. § 2254 to challenge the constitutionality of his June 29, 2001, aggravated sodomy conviction in the Superior Court of Gwinnett County. Now before the Court are the habeas petition and supporting brief [Docs. 1, 4]; the Answer-Response, with supporting brief and exhibits [Docs. 10, 12]; the reply thereto [Doc. 11]; and Petitioner's motion for reconsideration [Doc. 16] of

this Court's previous order denying his motion to expedite.

I. PROCEDURAL HISTORY

A. Trial proceedings

On June 24, 1998, a Gwinnett County grand jury returned a seven-count indictment against Petitioner, charging him with (1) one count of aggravated sodomy and three counts of sexual battery upon Ms. Katharine Davis[1] on February 15, 1998 (Counts 1-4); (2) two counts of sexual battery upon Ms. Kristen Ann Vick on February 13, 1998 (Counts 5-6); and (3) one count of violating his oath as a Gwinnett County police officer on February 15, 1998 (Count 7).[2] [Resp't Ex. AA, Appellate Record at 4-7]. On June 29, 2001, after a jury trial during which Petitioner was represented by defense counsel, Mr. Walt Britt, a Gwinnett County jury found Petitioner guilty on the aggravated sodomy

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[1] By the date of trial, Ms. Davis was divorced and went by the name of Katharine Lentsch. [Resp't Ex. AA, Trial Tr.].

[2] The State later dismissed Count 7. [Resp't Ex. AA, Appellate Record at 52]. Prior to trial, the court granted Petitioner's motion to suppress two videotaped interviews that he had given to Gwinnett County investigators on February 17 and 20, 1998, regarding the alleged events of February 15, 1998. See State v. Stinson, 536 S.E.2d 293, 294 (Ga. Ct. App. 2000). In an interlocutory appeal, the Georgia Court of Appeals reversed the trial court's order and ruled the videotapes admissible. Id. at 295-96. In the first interview, Petitioner denied having had any sexual contact with Ms. Davis, but in the second, he admitted the contact, but described it as consensual. [Resp't Ex. BB, Trial Tr. 606-88, 899-922]. The admission of this evidence is not at issue herein.

count and on four of the five counts of sexual battery, acquitting him on one of the counts involving Ms. Vick. [Id. Appellate Record at 57 & Trial Tr.]. Petitioner received a 20-year split sentence on the aggravated sodomy conviction, with 15 years to serve in prison and 5 years to serve on probation, along with 4 concurrent 1-year sentences of probation on the sexual battery convictions, for a total term of probation of 6 years. [Id. Appellate Record at 58].

B. Motion for a new trial and direct appeal

Still represented by Mr. Britt, Petitioner filed a motion for a new trial, claiming that the trial court erred in refusing to admit certain evidence and to given certain jury instructions related to the credibility of the two alleged victims. [Id. Appellate Record at 97-100]. After a December 7, 2001, hearing on the motion for a new trial [Resp't Ex. BB, Hearing Tr.], the trial court denied the motion, noting that there was sufficient evidence to convict Petitioner beyond a reasonable doubt pursuant to the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979). [Resp't Ex. AA, Appellate Record at 108-110]. Still represented by Mr. Britt, Petitioner filed a notice of appeal, raising claims similar to those he had raised in his motion for a new trial. [Resp't Ex. AA, Appellant's Br. at 13]. The Georgia Court of Appeals summarized the evidence with respect to Ms. Davis as follows:

State's evidence showed that in the early morning hours of February 14, 1998,[3] the complaining witness, K. D. [Ms. Davis], was sitting in a car in the parking lot of a supermarket. She was there with a man with whom she had previously worked and had an affair. Stinson [Petitioner], a uniformed Gwinnett County police officer, appeared on the scene and decided to investigate. After discovering that K. D.'s driver's license had been suspended, Stinson instructed her male companion to leave. While detaining K. D., Stinson sexually battered her in various ways and forced her to perform oral sex. Following this incident, K. D. and her husband divorced. Stinson's defense was that his sexual contact with K. D. was consensual. Stinson v. State, 569 S.E.2d 858, 860 (Ga. Ct. App. 2002). The court denied Petitioner's appeal, noting, inter alia, that "the [trial] court did not err in refusing to instruct the jury that it should consider [Ms. Davis's] character in determining whether the sexual contact with [Petitioner] was consensual or against her will." Id. at 861.

B. Extraordinary motion for a new trial

On March 4, 2003, represented by new counsel, Mr. McNeill Stokes, Petitioner filed an extraordinary motion for a new trial. [Resp't Ex. A]. Petitioner alleged the discovery of new evidence indicating his innocence, namely, the "systemic conflict of interest" of his former counsel, Mr. Britt, arising from Mr. Britt's prior representation of

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[3] Actually, by the time of the events in question, it was February 15, 1998. [See Resp't Ex. AA, Appellate Record at 4-7].

Gwinnett County. Petitioner argued that this conflict inhibited Mr. Britt's defense of him because, in exchange for Petitioner's conviction, Ms. Davis had offered to, and later did, dismiss her civil lawsuit against Gwinnett County for damages arising from Petitioner's alleged crimes against her. [Id. ¶¶ 1-3]. Petitioner argued that prejudice arising from this conflict was presumed as a matter of law and that, moreover, he was actually prejudiced by Mr. Britt's failure to move for acquittal on the aggravated sodomy charge based on the lack of evidence that Petitioner had used force against Ms. Davis. [Id. ¶¶ 3-5]. Petitioner also claimed that he was prejudiced by Mr. Britt's failure to object to the following jury instruction: "Lack of resistance, induced by fear, is not legally cognizable consent but is force." Petitioner argued that this instruction improperly "merge[d] the two separate necessary elements of lack of consent and force." [Id. ¶ 6].

On March 7, 2003, the trial court summarily denied Petitioner's extraordinary motion for a new trial, "without the necessity of a hearing," because the motion "fail[ed] to show any merit on its face." [Resp't Ex. C at 1]. The court cited no caselaw to support its ruling on Petitioner's substantive claims, although it did cite Dick v. State, 287 S.E.2d 11, 13-14 (Ga. 1982) (setting forth the six requirements for prevailing on an extraordinary motion for a new trial based on newly discovered evidence). [Resp't Ex. C at 1]. Petitioner unsuccessfully sought leave to file a discretionary appeal of the trial court's order. [See Resp't Ex. J & Exs. A-B attached thereto; Doc. 4 at 3-4; Doc. 10-2 at 3-4]. Throughout the proceedings on his extraordinary motion, Petitioner's only reference to federal constitutional law was his

citation of Cuyler v. Sullivan, 446 U.S. 335 (1980), for the proposition that a defense attorney's systemic conflict of interest is never harmless. [See Resp't Ex. B (Petitioner's Brief in Support of Extraordinary Motion for New Trial) at 4; Resp't Ex. D (Petitioner's Application for Discretionary Appeal) at 18; Resp't Ex. J (Petitioner's Petition for Writ of Certiorari) at 13]. Moreover, the only consideration, by any state court, of the merits of Petitioner's claims was the trial court's cursory conclusion that the extraordinary motion was meritless on its face. [See Resp't Ex. C at 1; Resp't Ex. J, Exs. A-B].

D. State habeas proceedings

On October 17, 2003, still represented by Mr. Stokes, Petitioner filed a habeas corpus petition in the Superior Court of Muscogee County, raising the following three claims:

(1) Petitioner is not guilty as a matter of law because there was no force or threat of force involved in [his] conviction for aggravated sodomy which is a necessary element under the controlling authority of O.C.G.A. § 16-6-2 and its interpreting law;

(2) The charge of the Court [that] "Lack of resistance, induced by fear, is not legally [cognizable] consent, but is force" is erron[e]ous under the facts established at trial; and

(3) [Petitioner's] former counsel had a conflict of interest because he had previously represented Gwin[n]ett County which was involved in a lawsuit

with the alleged victim arising out of the same case and this conflict would have made a difference in the outcome of [Petitioner's] trial.

[Resp't Ex. M Part II]. Petitioner's only mention of a federal constitutional violation in his original Brief in Support of Application for Habeas Corpus was, once again, a reference to Cuyler. [Id. Supp. Br. at 12]. However, because the respondent "raised the defense" that Petitioner had expressed no "constitutional allegations" in his state habeas petition and supporting brief, Petitioner moved to amend his petition to allege that his conviction and incarceration were "in violation of the Due Process Clauses of the Georgia and United States Constitutions" and "of the right to counsel guaranteed under the Georgia and United States Constitutions." [Resp't Ex. O ¶¶ 2, 4].

After a hearing on November 17, 2003 [Resp't Ex. Y], the state habeas court made the following factual findings in an order dated May 27, 2004: (1) "there was no evidence of force, threats of force or intimidation of force proven at the Petitioner's trial[,] and the complaining witness was never under arrest or in custody," and (2) "Petitioner's trial and appeals [counsel], Walt M. Britt, had formerly represented Gwinnett County and . . . there was no waiver of a conflict when the complaining witness had filed a lawsuit against Gwinnett County[,] and [Mr. Britt] did not raise the issue of the lack of force which would have made a difference in the outcome of the Petitioner's trial." [Resp't Ex. R at 4]. Accordingly, the state habeas court granted Petitioner's request for relief with respect to his

aggravated sodomy conviction and ordered a new trial on that charge. [Id. 5-6].

On appeal [see Resp't Exs. S-X], the Georgia Supreme reversed the state habeas court's ruling because Petitioner's habeas petition "was based on the same three grounds" that he had raised in his extraordinary motion for a new trial. Thompson v. Stinson, 611 S.E.2d 29, 30 (Ga. 2005).

> As the issues [Petitioner] raised in his petition for habeas corpus have already been presented to the trial court, where relief was denied, and as [he] has already had his appeal of that decision rejected by the appellate courts in the manner provided by [state] law, the habeas court should have dismissed the petition as procedurally barred.

Id. at 30-31 (citation omitted). The court rejected Petitioner's argument that the procedural bar should be lifted due to his "actual innocence," stating that

> even if that exception to the procedural bar rule is applied, it does not warrant the relief [Petitioner] sought in the habeas court; the victim testified that she submitted to [his] desires because she believed that if she did not, he would physically hurt her, which, in the context of [his] words and actions, constituted a reasonable fear. Id. at 31 (citing Jackson v. Virginia, supra; Brewer v. State, 523 S.E.2d 18 (Ga. 1999)).

E. The instant federal habeas petition

On June 15, 2005, still represented by Mr. Stokes, Petitioner filed the instant federal habeas corpus petition in the United States District Court for the Middle District of Georgia, which court then transferred the petition here. [Docs. 1, 6-8]. Petitioner raises the same three grounds for relief that he raised in his state habeas petition:

> (1) Petitioner is not guilty as a matter of law because the State did not prove the necessary element of force for a conviction [for] aggravated sodomy [Ground One];
>
> (2) Petitioner's counsel suffered under a conflict of interest and was ineffective in that he did not make a motion for acquittal because there was no force proven as a necessary element of aggravated sodomy [Ground Two]; and
>
> (3) The trial court gave an erroneous jury charge that . . . merged lack of consent and force resulting in an unconstitutional conviction instructing that the Petitioner could be convicted of aggravated assault [sic] without proof [of] the necessary element of force [Ground Three].

[Doc. 1 ¶ 12].

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus on behalf of a

person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. See 28 U.S.C. § 2254(a). This power, however, is limited. A federal court may not grant habeas corpus relief for claims previously adjudicated on the merits by a state court unless that adjudication resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court's determination of a factual issue is presumed correct unless the habeas petitioner rebuts that presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court explained that, in applying 28 U.S.C. § 2254(d), a federal habeas court first determines the "clearly established federal law" based on "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412. The federal habeas court then determines whether the state court decision is "contrary to" that clearly established federal law, i.e., whether the state court "applies a rule that contradicts the governing law set forth" in Supreme Court cases or "confronts a set of facts that are materially indistinguishable from" a Supreme Court decision "and nevertheless arrives at a result different from" that decision. Id. at 405-06.

When, however, based on the brevity of the state court's order, "it is far from clear what, if any,

rule of federal law the [court] applied," a federal habeas court "will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's 'contrary to' clause." Romine v. Head, 253 F.3d 1349, 1365 (11th Cir. 2001) (applying a de novo standard of review to a habeas claim and noting that "when there is grave doubt about whether the state court applied the correct rule of governing federal law, § 2254(d)(1) does not apply"). Nevertheless, "[t]he state court's failure to cite the relevant Supreme Court precedents does not mean that [§ 2254(d)(1)] deference does not apply." Parker v. Sec'y for Dep't of Corr., 331 F.3d 764, 776 (11th Cir. 2003) (noting that Romine was "a narrow decision" involving "a case in which it was unclear whether the federal constitutional issue had been raised and decided in state court") (internal quotations omitted). "All that is required under § 2254(d)(1) is an adjudication on the merits, not a full state court opinion." Id.

If the federal habeas court determines that the state court decision is not contrary to clearly established federal law, it then determines whether the decision is an "unreasonable application" of that law, i.e., whether "the state court identifies the correct governing legal principle" from the Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413. The touchstone of this inquiry is whether the state court's application of federal law is "objectively" unreasonable. Id. at 409. A federal habeas court may not grant relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously

or incorrectly. Rather, that application must also be unreasonable." Id. at 411. Section 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), "imposes a highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Stephens v. Hall, 407 F.3d 1195, 1202 (11th Cir.) (internal quotations omitted), cert. denied, 126 S. Ct. 278 (2005). "Even clear error, standing alone, is not a ground for awarding habeas relief." Id.

This Court has reviewed the pleadings and exhibits and finds that the record contains sufficient facts upon which the issues may properly be resolved. As Petitioner has not made a showing sufficient to warrant a federal evidentiary hearing, pursuant to 28 U.S.C. § 2254(e), the case is now ready for disposition.

III. DISCUSSION

A. Procedural default and scope of review

Petitioner asserts that he has not procedurally defaulted his federal grounds for relief because the Georgia Supreme Court addressed the merits of the claims set forth therein when it reversed the state habeas court's ruling. [Doc. 4 at 8-10]. Petitioner also asserts that even if his claims are defaulted, this Court's failure to grant his habeas petition would constitute a miscarriage of justice, thereby excusing any procedural default. In the alternative, Petitioner argues that his trial counsel's

ineffectiveness constitutes cause and that the resulting trial errors constitute prejudice, also excusing any procedural default. [Id. 10-14].

The state does not assert the defenses of lack of exhaustion or procedural default with respect to Petitioner's three grounds for relief. [See Doc. 10-1 at 2; Doc. 10-2 at 9]. Moreover, the Georgia Supreme Court's rationale for concluding that Petitioner's constitutional claims were procedurally barred on state habeas review, namely, that he had raised and exhausted them via his extraordinary motion for a new trial, is sufficient to establish that Petitioner has not procedurally defaulted the three grounds for relief set forth herein. Accordingly, the undersigned will consider these grounds on the merits and, moreover, will examine them de novo because "it is far from clear what, if any, rule of federal law the [state courts] applied" in denying Petitioner's extraordinary motion for a new trial. See Romine, 253 F.3d at 1365.

B. Ground One: The State's failure to prove that Petitioner used force

Petitioner sets forth the following arguments and evidence in support of his Ground One claim. "There is not one scintilla of . . . evidence in the record that supports" the Georgia Supreme Court's statement that "the victim testified she submitted [to Petitioner] because she believed if she did not submit he would physically hurt her." [Doc. 4 at 5]. Ms. Davis's testimony simply does not support a conclusion that Petitioner used force or coerced sexual favors from her. [Id. 14-24]. Therefore, he

"must be adjudged not guilty as a matter of law because of the lack of any force or threat of force or intimidation of force which is a necessary element of the offense of aggravated sodomy." [Id. 15]. The mere fact that he was in uniform and wearing a gun and a badge does not satisfy the necessary element of force because Ms. Davis "did not communicate in any way her lack of consent to oral sex that required her active voluntary participation twice." [Id. 14-16, 18-19].

Ms. Davis testified that Petitioner placed his hand on the back of her head and guided her down for oral sex, rather than pulling her down, demonstrating an absence of force. [Id. 17 (citing Trial Tr. 430)]. Moreover, in a videotaped statement that Ms. Davis gave to the police on February 19, 1998, she stated that when Petitioner put his arm around her back to pull her towards him for oral sex, "there wasn't any forcefulness about it when he put his hand back there." [Trial Tr. 859]. Ms. Davis testified that when Petitioner "pulled [her] head out" so that he would not ejaculate, she "went right back down again to try to make him come," and he "pulled [her] head back up" a second time. [Trial Tr. 432]. Although Ms. Davis testified that she was "nervous" and "scared" because it was dark and she was alone with Petitioner, she failed to voice any objection during the two or three minutes required for Petitioner, unsolicited, to place his hand "between [her] butt and [the] back of [her] thigh," lift her shirt and bra, fondle and kiss her breasts, unbutton her pants, fondle her genitals, and then return her pants, shirt, and bra to their original configuration. [Trial Tr. 42428]. In fact, Ms. Davis was not afraid

of Petitioner but rather feared the anticipated reaction of "her abusive husband" (who had threatened to slit her "from ear to ear" if she ever cheated on him) when he learned that she had been "caught in a compromising situation with a seventeen year old with whom she had previously been intimate." Ms. Davis had nothing to fear from Petitioner – she already had been issued a citation, she was not in custody, and she knew that she was not going to jail because Petitioner had placed a call for her husband to retrieve her. [Doc. 4 at 17-18, 21-22 (citing Trial Tr. 414, 424, 432, 437, 442, 474-75, 488, 496-501, 507)]. When Petitioner asked Ms. Davis how she felt about oral sex, she did not object. [Doc. 4 at 16, 17-18.] Instead, she engaged in oral sex "not just once, but twice, and even after the Petitioner pushed her away." [Id. 18 (citing Trial Tr. 432, 867-69)].

Respondent argues that the Georgia Supreme Court's conclusion that, pursuant to Jackson v. Virginia, supra, there was sufficient evidence to convict Petitioner of aggravated sodomy -- so that his assertion of actual innocence failed as a gateway to the consideration of his state habeas claims on the merits – is entitled to deference under 28 U.S.C. § 2254(d). [Doc. 10-2 at 9-10]. Respondent asserts that, in light of Ms. Davis's trial testimony, the Georgia Supreme Court's conclusion is a reasonable application of the federal constitutional test for evidence sufficient to support a conviction. [Id. 10-14]. Respondent notes that Ms. Davis testified that she did not want Petitioner to do any of the things he did to her and that she did not submit to Petitioner in order to avoid a citation or a trip to jail, although she had cried earlier when faced with the prospect of

going to jail. [Id. 11-12 (citing Trial Tr. 413, 429)]. Ms. Davis also testified that when Petitioner proposed oral sex, she "just cried"; she "didn't feel like [she] had a choice in the matter"; and her persistence during oral sex, which lasted "just a couple of minutes" in any case, derived from her desire to develop evidence against Petitioner. [Trial Tr. 429-32; see id. 864-70; see also id. 851 (Ms. Davis's statement to the police on February 19, 1998, that when Petitioner was fondling her she "was just standing there shaking"); id. 428-29 (Ms. Davis's testimony that she feared that Petitioner would hurt her if she resisted because he was much bigger than her husband, who she believed "would kill" her if she "tried to fight"); id. 893-94, 900-06 (Petitioner's second videotaped interview, dated February 20, 1998, wherein he described the sequence of events at issue in the same general terms as Ms. Davis)].

1. The standard for sufficiency of the evidence

A petitioner "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 324 & n.16 (noting that "the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law"). The relevant due process inquiry is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 318-19, 326 (noting that a federal habeas court "faced with a record of historical facts that supports conflicting inferences must presume . . . that the trier of fact

resolved any such conflicts in favor of the prosecution, and must defer to that resolution").

2. The Georgia law of aggravated sodomy

Under Georgia law, sodomy includes "any sexual act involving the sex organs of one person and the mouth . . . of another," and aggravated sodomy is "sodomy with force and against the will of the other person." O.C.G.A. § 16-6-2(a). Georgia caselaw is replete with the propositions that "[t]he term force includes not only physical force, but also mental coercion, such as intimidation" and that "[l]ack of resistance, induced by fear, is . . . force." Brewster v. State, 584 S.E.2d 66, 69 (Ga. Ct. App. 2003) (concluding that there was "sufficient evidence of force to support a verdict of guilty on the aggravated sodomy count" despite appellant's argument that "there was no evidence showing force" because the victim testified that he "had been 'nice' to her" – appellant, a stranger to the victim, had intruded into her home while she was asleep and initiated sexual contact, and the victim had "testified that she did not resist him because she was afraid").

Petitioner argues that the foregoing propositions no longer control in aggravated sodomy cases because of the change in the law established by Brewer v. State, 523 S.E.2d 18, 19-20 (Ga. 1999) (overruling the presumption of force in Cooper v. State, 352 S.E.2d 382 (Ga. 1987), and related aggravated sodomy cases), and Luke v. Battle, 565 S.E.2d 816, 818-19 (Ga. 2002) (making retroactive to cases on collateral review the new rule of

substantive law established in Brewer that "the term 'force' in the aggravated sodomy statute [no longer permits] the State to convict a person of aggravated sodomy by showing only that he had engaged in an act of sodomy with an underage victim," but requires "the State . . . to prove force by acts of force"). [Doc. 4 at 15, 16-17, 19-20.]

In Brewer, however, the Georgia Supreme Court reiterated the principle that, although force must be proven and may not be presumed, "'force' or 'forcibly' means acts of physical force, threats of death or physical bodily harm, or *mental coercion, such as intimidation*." Brewer, 523 S.E.2d at 20 (emphasis added). See Luke, 565 S.E.2d at 818 (stating that acts of force "could include acts of intimidation and mental coercion against the victim"). Accordingly, under Georgia law, proof of the use of force sufficient to support a conviction for aggravated sodomy can be established via evidence of intimidation and mental coercion, not involving the use of physical force, regardless of the age of the alleged victim.

3. **The State presented sufficient evidence to convict Petitioner of aggravated sodomy**

"Issues regarding the credibility of the witnesses fall solely within the province of the jury." McKee v. State, 632 S.E.2d 636, 637 (Ga. 2006). "The testimony of a single witness is generally sufficient to establish a fact." O.C.G.A. § 24-4-8. Therefore, under Georgia law, Ms. Davis's testimony was

sufficient to establish the facts supporting Petitioner's aggravated sodomy conviction.

Petitioner's various arguments regarding the sufficiency of the evidence ultimately boil down to the following two claims: (1) he did not use extreme physical force against Ms. Davis, whose testimony reveals that he was gentle with her, and (2) Ms. Davis did not object to the sexual contact and, therefore, consented to it. Both of these arguments fail. As force is defined under Georgia law, the use of extreme physical force, or of any physical force, for that matter, is not required to support an aggravated sodomy conviction. Even so, it is undisputed that Petitioner used at least some physical force in his encounter with Ms. Davis, pulling her to him and guiding her head during the course of oral sex. Furthermore, a rational trier of fact could conclude from Ms. Davis's testimony that she failed to object to or resist Petitioner's sexual advances out of fear. Other than the intrusion into the victim's home, the facts of this case are quite similar to those of Brewster, 584 S.E.2d at 69, wherein the Georgia Court of Appeals concluded that there was sufficient evidence to convict the accused of aggravated sodomy. In each case, the accused and the victim were strangers; they were isolated in a secluded spot; the accused claimed that he treated the victim "nicely" or "gently" and did not use force against her; and the victim testified that she failed to resist due to her fear of the accused. Accordingly, there was sufficient evidence presented via the testimony of Ms. Davis to support Petitioner's

conviction under the federal constitutional standard set forth in Jackson v. Virginia, 443 U.S. at 324.[4]

C. Ground Two: Ineffective assistance of counsel

Petitioner argues that his trial counsel's failure to disclose his past representation of Gwinnett County created a systemic conflict of interest, from which prejudice must be presumed. [Doc. 4 at 24-28]. Petitioner argues further that the conflict caused actual prejudice because Ms. Davis agreed to drop her lawsuit against Gwinnett County in exchange for Petitioner's criminal conviction, which influenced trial counsel not to move the trial court for Petitioner's acquittal based on insufficient evidence of force. [Id. 27-28]. Petitioner alleges a conflict of interest based on a 1994 case in which his trial counsel, Mr. Britt, was disqualified from representing a Gwinnett County police officer accused of murder because of Mr. Britt's past and then current representation of Gwinnett County in civil matters. [Id. 25 (citing Chapel v. State, 443 S.E.2d 271 (Ga. 1994))]. However, there is no indication in the record that Mr. Britt has

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[4] Petitioner's reply brief arguments regarding the *federal* substantive standards for the use of force are inapposite to the issue herein, namely, whether the element of force under the *Georgia law* of aggravated sodomy was satisfied by the evidence presented at his trial. Petitioner appears to misconstrue the import of the Luke court's citation to Bousley v. United States, 523 U.S. 614 (1998), for the proposition that changes in the substantive law may apply retroactively on collateral review, which sheds no light on the definition of the elements of aggravated sodomy in Georgia. [See Doc. 11 at 6 (citing Luke, 565 S.E.2d at 818)].

represented Gwinnett County since that time. In fact, Respondent contends that, in at least two separate cases in recent years, Mr. Britt has represented clients who have sued Gwinnett County. [Doc. 10-2 at 19-20]. Petitioner has failed to challenge that contention. [See Doc. 11 at 8-11].

1. The standard for ineffective assistance of trial counsel

The Supreme Court set forth the standard for evaluating claims of ineffective assistance of trial counsel in Strickland v. Washington, 466 U.S. 668 (1984). "An ineffectiveness claim . . . is an attack on the fundamental fairness of the proceeding whose result is challenged." Id. at 697. The analysis involves two components, but a court need not address both if the petitioner "makes an insufficient showing on one." Id. First, a federal habeas court determines "whether, in light of all the circumstances, the identified acts or omissions [of counsel] were outside the wide range of professionally competent assistance." Id. at 690. The court "must be highly deferential" in scrutinizing counsel's performance and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. In other words, the petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. (internal quotations omitted). Second, a federal habeas court determines whether counsel's challenged acts or omissions prejudiced the petitioner, i.e., whether "there is a reasonable probability [one "sufficient to

undermine confidence in the outcome"] that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

2. The standard for ineffective assistance of appellate counsel

"A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). See Davis v. Sec'y for the Dep't of Corr., 341 F.3d 1310, 1316 (11th Cir. 2003) (noting that "prejudice" from the alleged deficient performance of appellate counsel is "the reasonable probability that the outcome of the appeal would have been different") (internal quotations omitted).

Appellate counsel, however, "need not advance every argument, regardless of merit, urged by the appellant." Evitts, 469 U.S. at 394. A neglected claim satisfies the test for ineffective assistance only if the claim would have had "a reasonable probability of success on appeal." Heath v. Jones, 941 F.2d 1126, 1130-31, 1132 (11th Cir. 1991) (noting that the Supreme Court, in Jones v. Barnes, 463 U.S. 745, 751-52 (1983), held that "the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue" and suggested that "effective advocates 'winnow out' weaker arguments even though the weaker arguments may be meritorious," and, in Smith v. Murray, 477 U.S. 527 (1986), "recognized that even though a non-appealed issue might have been successful, the appellate advocacy had to be judged in its entirety").

3. The standard for a defense attorney's conflict of interest

Furthermore, with respect to an alleged conflict of interest, "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance," although, if he can do so, he "need not demonstrate prejudice in order to obtain relief." Cuyler, 446 U.S. at 350. See Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir. 1999) (en banc) (stating that to prevail on a conflict of interest claim a habeas petitioner must establish that an "actual conflict" had an "adverse effect" at trial, by showing that (1) there was "some plausible alternative defense strategy or tactic," (2) "the alternative possessed sufficient substance to be a viable" one, and (3) "the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests") (internal quotations omitted). See also Schwab v. Crosby, 451 F.3d 1308, 1322 (11th Cir. 2006) (noting that "[t]he Supreme Court held in Sullivan that, at least in cases of concurrent multiple representation, a defendant is presumed to be prejudiced where he can show (1) 'that his counsel actively represented conflicting interests' and (2) that the conflict 'adversely affected his lawyer's performance,'" but "the possibility of conflict is insufficient to impugn a criminal conviction"). The Eleventh Circuit "will not find an actual conflict unless . . . . [there is] a factual showing of inconsistent interests and . . . [a further showing] that the attorney made a choice between

possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." Barham v. United States, 724 F.2d 1529, 1532 (11th Cir. 1984) (internal quotations omitted). If the attorney "did not make such a choice, the conflict remain[s] hypothetical." Id.

4. Petitioner has not demonstrated an actual conflict of interest

Petitioner's allegation that Mr. Britt suffered from a "systemic" conflict of interest is not supported by any record evidence. Petitioner's citation to Chapel, supra, a case decided seven years prior to his trial, is inapposite. Petitioner suggests that Mr. Britt was constrained from vigorously prosecuting the defense by his desire to protect Gwinnett County from Ms. Davis's civil suit. However, Ms. Davis testified that she had "dropped" that lawsuit by the time of Petitioner's criminal trial. [See Trial Tr. 452-55; see also Resp't Ex. Z at 14 (Mr. Britt's December 2003 deposition testimony that Ms. Davis had voluntarily dismissed her lawsuit approximately one year before Petitioner's trial)]. Moreover, as noted supra, "since the Chapel case," Mr. Britt has represented interests adverse to Gwinnett County, having "sued the county twice arising out of criminal cases." [Resp't Ex. Z at 10.] At the time of Petitioner's trial, Mr. Britt "had not since Chapel represented Gwinnett County in anything." [Id.] Petitioner's assertion of a conflict of interest based on Mr. Britt's prior representation of Gwinnett County is "hypothetical," at best, not actual. See Barham, 724 F.2d at 1532. In short, there is no

evidence of Mr. Britt's having "actively represented conflicting interests," to the detriment of Petitioner, such that prejudice may be presumed. See Schwab, 451 F.3d at 1322. Accordingly, Petitioner's claim of ineffective assistance of counsel based on an actual conflict fails because he has not demonstrated that Mr. Britt suffered from such a conflict.

5. Petitioner was not prejudiced by counsel's failure to seek acquittal due to insufficient evidence of force

Therefore, in order to prevail on his ineffective assistance of counsel claims, Petitioner must come forward with evidence of actual prejudice, and this he has not done. See Strickland, 466 U.S. at 694; Davis, 341 F.3d at 1316. Given the trial evidence satisfying the elements of force and lack of consent required to prove aggravated sodomy, set forth in great detail supra, there is no reasonable probability that a motion for acquittal based on the alleged lack of evidence of force, or a claim on direct appeal to that same effect, would have altered the outcome of Petitioner's trial or direct appeal, respectively. See Thompson, 611 S.E.2d at 30; Stinson, 569 S.E.2d at 860-61. Accordingly, Petitioner's claims of ineffective assistance of counsel fail.

C. Ground Three: Misleading and improper jury instruction

Petitioner's final ground for relief involves the following instruction that the trial court gave to the jury regarding the charge of aggravated sodomy:

> Sodomy is when a person performs or submits to any sexual act involving the sex organs of one person in the mouth or anus of another.
>
> A person commits the offense of aggravated sodomy when that person commits sodomy with force and against the will of the other person.
>
> Force may be proved by circumstantial or direct evidence. Lack of resistance, induced by fear, is not legally cognizable consent but is force.

[Trial Tr. 1140]. Petitioner argues that this erroneous "lack of resistance" jury instruction "likely misled the jury to convict the Petitioner without the necessary element of force being proven." [Doc. 11 at 11]. Petitioner asserts that the Georgia caselaw underlying this jury instruction has been superseded by caselaw "requiring that the indispensable element of force must be proven," not presumed. [Id. 12].

An improper jury instruction "can never be the basis for federal habeas corpus relief unless the instruction rendered the whole trial so unfair as to amount to a denial of due process." Jones v. Dugger, 888 F.2d 1340, 1343 (11th Cir. 1989). Here, the trial court recited to the jury the oft-repeated proposition, see Brewster, 584 S.E.2d at 69, that when an accused places the victim in such fear that she fails to resist his sexual advances, her failure to resist not only does not constitute consent, but also may satisfy the use-of-force requirement for an aggravated sodomy conviction, which, as noted supra, includes the use of mental coercion and intimidation.

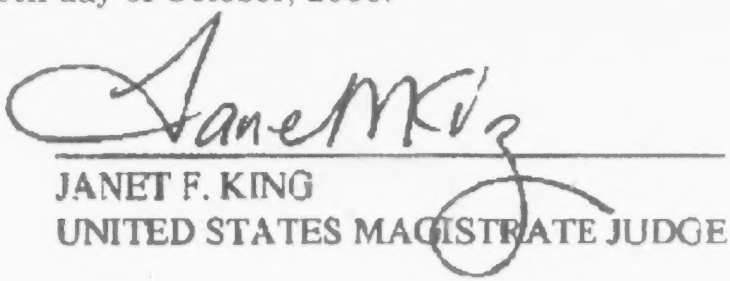
Accordingly, the jury instruction at issue did not render Petitioner's trial so unfair as to deny him due process of law, and Ground Three also fails.

IV. CONCLUSION

For the foregoing reasons, **IT IS RECOMMENDED** that the instant petition for a writ of habeas corpus [Doc. 1] be **DENIED** and that the instant action be **DISMISSED**. Petitioner's motion for reconsideration [Doc. 16] of this Court's previous order denying his motion to expedite is **DENIED AS MOOT**.

The Clerk is **DIRECTED** to terminate the referral to the Magistrate Judge.

IT IS SO ORDERED AND RECOMMENDED this 10th day of October, 2006.



JANET F. KING
UNITED STATES MAGISTRATE JUDGE

SUPREME COURT OF GEORGIA

THOMPSON v. STINSON.

S04A1717.

279 Ga. 196; 611 S.E.2d 29

March 28, 2005, Decided

Hines, Justice

Warden Thompson appeals from the grant of a writ of habeas corpus to prisoner James Terry Stinson. For the reasons that follow, we reverse.

Stinson was convicted of one count of aggravated sodomy and four counts of sexual battery. His conviction was affirmed in *Stinson v. State*, 256 Ga. App. 902 (569 SE2d 858) (2002). Through new counsel, Stinson filed an extraordinary motion for new trial. The trial court denied the motion, and the Court of Appeals denied his application for discretionary appeal to review the trial court's denial order. Stinson petitioned this Court for a writ of certiorari to the Court of Appeals, which was also denied

Thereafter, Stinson filed a petition for a writ of habeas corpus in the Superior Court of Muscogee County. In its findings of facts, the habeas court recited that Stinson's extraordinary motion for new trial raised the grounds that: the element of force had not been proved as to the aggravated sodomy charge; the trial court gave an erroneous instruction

to the jury on force and consent; and Stinson's trial counsel had an undisclosed conflict of interest that affected the outcome of Stinson's trial. The habeas court then recited that Stinson's petition for habeas corpus was based on the same three grounds. Despite these recitations, the habeas court concluded that "[t]his habeas proceeding is not procedurally barred," and granted the petition. This was error.

The writ of habeas corpus is not to be used as a means of obtaining a second appeal. [Cit.] After review by an appellate court, the same issues will not be reviewed on habeas corpus. [Cit.] The appellate courts exist to review appeals. It is not the function of state habeas corpus courts to review issues already decided by an appellate court. ...

Brown v. Ricketts, 233 Ga. 809, 811 (1) (213 SE2d 672) (1975). As the issues Stinson raised in his petition for habeas corpus have already been presented to the trial court, where relief was denied, and as Stinson has already had his appeal of that decision rejected by the appellate courts in the manner provided by law, see OCGA §§ 5-6-35 (a) (7); 5-6-15, the habeas court should have dismissed the petition as procedurally barred. *Brown*, supra.

However, Stinson argues that no procedural bar should apply because he is "actually innocent" as there was no evidence to support the element of force required to convict him for aggravated sodomy, see *Jackson v. Virginia*, 443 U. S. 307 (99 S. Ct. 2781, 61 LE2d 560) (1979), and therefore it would be a "miscarriage of justice" to apply procedural bar. See *Head v. Stripling*, 277 Ga. 403, 409-410 (2) (590

SE2d 122) (2003). Nonetheless, even if that exception to the procedural bar rule is applied, it does not warrant the relief Stinson sought in the habeas court; the victim testified that she submitted to Stinson's desires because she believed that if she did not, he would physically hurt her, which, in the context of Stinson's words and actions, constituted a reasonable fear. See *Brewer v. State*, 271 Ga. 605, 607-608 (2) (523 SE2d 18) (1999).

Judgment reversed. All the Justices concur.

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

JAMES TERRY STINSON,
Petitioner,

Vs. CIVIL ACTION FILE
NO. 2003 CV 34188

WENDY THOMPSON,
WARDEN, RUTLEDGE
STATE PRISON,

Respondent. HABEAS CORPUS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. The Petitioner-Defendant, James Terry Stinson, was a Gwinnett County police officer and who was indicted for sexual battery and aggravated sodomy arising out of an incident in the early morning hours of February 14, 1998 when the complaining witness performed oral sex upon him while he was in uniform.

2. The prosecution contented that because the Petitioner was in uniform was tantamount to force. The trial judge at the request of the prosecution gave a charge which stated that, "Lack of resistance, induced by fear, is not legally cognizable consent but is force." The jury found the Petitioner guilty of

sexual battery and aggravated sodomy on June 29, 2001. The Petitioner was sentenced to 12 months for each count of sexual battery and twenty years to serve fifteen years for aggravated sodomy.

3. The Petitioner's trial attorney, Walter M. Britt, filed an appeal to the Court of Appeals of Georgia and on May 30, 2002, the Court of Appeals og Georgia in *Stinson v. State*, 256 Ga. App. 902 (2002) issued an opinion denying his appeal on issues which did not involved the issues raised for the first time by his new counsel, McNeill Stokes, in the Motion for Extraordinary Motion for New Trial and in this Application for Writ of Habeas Corpus. The Georgia Supreme Court denied the Defendant's Petition for Writ of Certiorari on October 28, 2002 to review the opinion of the Georgia Court of Appeals.

4. The Petitioner through his new counsel filed an Extraordinary Motion for New Trial on the grounds that the Petitioner is innocent as a matter of law because there was no force proven at trial, that there was evidence of the complaining witness' consented to perform oral sex upon the Petitioner, that the above quoted charge of the court merging consent and force was erroneous, and that the Petitioner had been denied effective assistance of counsel in his trial and direct appeal because his attorney, Walt M. Britt, who had an undisclosed and non-waived previous representation of Gwinnett County which was in litigation with the complaining witness and was a systemic conflict of interest that would have made a difference in the outcome of his trial. The Trial Court on March 7, 2002 summarily denied the Extraordinary Motion for New Trial without hearing. The Petitioner sought discretionary review

by the Court of Appeals of Georgia in this case of *James Terry Stinson v. State of Georgia*, Court of Appeals Docket No. A03D0280, which denied discretionary review on April 25, 2003 Motion for Reconsideration was denied by the Court of Appeals on May 14, 2003. The Petitioner filed for a Writ of Certiorari with the Georgia Supreme Court on May 19, 2003 which was subsequently denied.

5. The Petitioner filed an application for Writ of Habeas Corpus in the Superior Court of Muscogee County on October 16, 2003 on the grounds that the Defendant is not guilty as a matter of law because of the lack of any proof of force which is a necessary element for the conviction of aggravated sodomy, that the complaining witness voluntary performed oral sex on the Petitioner, and that the Petitioner's former counsel had a conflict of interest because he had previously represented Gwinnett County which was involved in a lawsuit with the complaining witness arising out of the same case and that this conflict of interest would have made a difference in the outcome of the Defendant's trial. The Attorney General filed a Return and Answer on November 6, 2003. A hearing was held on November 17, 2004 when Petitioner filed an amended Application for Writ of Habeas Corpus which was admitted without objection, and post hearing briefs were subsequently filed.

6. Upon review of the transcript of the Petitioner's trial, the Court finds that there was no evidence of force, threats of force or intimidation of force proven at the Petitioner's trial and the complaining witness was never under arrest or in custody.

7. The Court finds that the Petitioner's trial and appeals, Walt M. Britt, had formerly represented Gwinnett County and that there was no waiver of a conflict when the complaining witness had filed a lawsuit against Gwinnett County and Petitioner's trial and appeals attorney did not raise the issue of the lack of force which would have made a difference in the outcome of the Petitioner's trial.

CONCLUSIONS OF LAW

1. This Court has personal and subject matter jurisdiction over this habeas corpus proceeding.

2. This habeas corpus proceeding is not procedural barred.

3. The element of force by the Petitioner was not proven at trial which is a necessary element for the conviction of aggravated sodomy. O.C.G.A. § 16-6-2. The Petitioner cannot be legally convicted of aggravated sodomy without the State proving the necessary element of force. *Hines v. State*, 173 Ga. App. 657 (1985), *Brewer v. State*, 271 Ga. 605 (1999), *Luke v. Battle*, 275 Ga. 370 (2002).

4. Petitioner's trial and appeals counsel, Walt M. Britt, did not disclose that he had formerly represented Gwinnett County which was a potential conflict of interest because the complaining witness was in a lawsuit with Gwinnett County arising out of the alleged conduct of the Petitioner and his counsel did not obtain an informed consent waiver. *Chapel v. State*, 264 Ga. 267 (1994).

5. Petitioner's trial and appeals counsel did not make a motion of acquittal or pursue as a grounds on appeal because the State had not proven the necessary element of force which should have made a difference in the outcome of the Petitioner's trial.

6. Petitioner has met his burden that he is entitled to habeas corpus relief and the Petitioner's aggravated sodomy conviction together with the sentence imposed thereunder are invalid and subject to a new trial.

ENTERED this 27th day of May, 2004.

s/Robert G. Johnston, III
Robert G. Johnston, III
Judge, Superior Court of
Muscogee County

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

JAMES TERRY STINSON,
Petitioner,

Vs. CIVIL ACTION FILE
NO. 2003 CV 34188

WENDY THOMPSON,
WARDEN, RUTLEDGE
STATE PRISON,

Respondent. HABEAS CORPUS

ORDER GRANTING WRIT OF HABEAS CORPUS

The Application for Writ of Habeas Corpus of Petitioner, James Terry Stinson, is hereby GRANTED. The conviction for aggravated sodomy of the Petitioner together with the sentence imposed thereunder are declared invalid and subject to a new trial. Petitioner is ORDERED to be remanded to the custody of Gwinnett County Sheriff pending determination of a new trial by the prosecuting authority of Gwinnett County.

ENTERED this 27th day of May, 2004.

s/Robert G. Johnston, III
Robert G. Johnston, III
Judge, Superior Court of
Muscogee County

COURT OF APPEALS OF GEORGIA, SECOND DIVISION

STINSON v. THE STATE.

A02A1551.

256 Ga. App. 902; 569 S.E.2d 858

May 30, 2002, Decided

PHIPPS, Judge.

Following remand in *State v. Stinson*,[1] James Stinson was tried and convicted of one count of aggravated sexual battery and four counts of sexual battery. In this appeal of his convictions, he complains of certain of the trial court's evidentiary rulings and jury instructions. We find no error and affirm.

State's evidence showed that in the early morning hours of February 14, 1998, the complaining witness, K. D., was sitting in a car in the parking lot of a supermarket. She was there with a man with whom she had previously worked and had an affair. Stinson, a uniformed Gwinnett County police officer, appeared on the scene and decided to investigate. After discovering that K. D.'s driver's license had been suspended, Stinson instructed her

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[1] 244 Ga. App. 622 (536 S.E.2d 293) (2000) (reversing trial court's grant of Stinson's motion to suppress his pretrial statements to police).

male companion to leave. While detaining K. D., Stinson sexually battered her in various ways and forced her to perform oral sex. Following this incident, K. D. and her husband divorced. Stinson's defense was that his sexual contact with K. D. was consensual.

1. Stinson charges the trial court with error in refusing to admit pleadings in a civil action by K. D. against him, his chief of police, and Gwinnett County arising from the subject incident.

Although K. D. dismissed her action prior to trial,[2] Stinson argues that the county's answer should have been admitted because in it the county denied that Stinson committed the acts giving rise to this prosecution. According to Stinson, the State is, therefore, judicially estopped from taking a contrary position in this proceeding. There is no merit in this argument.

"The federal doctrine of judicial estoppel 'precludes a party from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding.'"[3] In the prior civil case, however, K. D. sued Gwinnett County. This is a prosecution

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[2] Compare *Chancellor v. State*, 165 Ga. App. 365, 372 (23) (301 S.E.2d 294) (1983).

[3] (Footnote omitted.) *Wolfork v. Tackett*, 273 Ga. 328 (540 S.E.2d 611) (2001).

by the State of Georgia against Stinson. The State could not have asserted an inconsistent position in the prior proceeding, because it was not a party to it. Moreover, the defense of estoppel is unavailable against the State where its application would thwart a strong public policy,[4] such as enforcement of the criminal law. For these reasons, the county's denial of the allegations of K. D.'s civil complaint in no way estops the State from bringing these criminal charges. In addition, the court allowed Stinson to elicit testimony concerning the county's answer to K. D.'s civil complaint, and defense counsel was permitted to comment on its contents during closing argument. The court merely ruled that the complaint could not go out with the jury. We find neither harm nor error.

2. Stinson contends that the trial court erred in refusing to admit K. D.'s petition for divorce. Stinson argues that statements in the divorce petition contradicted K. D.'s trial testimony. We find no contradiction.

3. Stinson complains of the trial court's refusal to instruct the jury on impeachment by proof of general bad character.

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[4] *State Soil & Water Conservation Comm. v. Stricklett*, 252 Ga. App. 430, 435 (2) (555 S.E.2d 800) (2001).

"A witness may be impeached by evidence as to his general bad character. The impeaching witness should first be questioned as to his knowledge of the general character of the witness, next as to what that character is, and lastly he may be asked if from that character he would believe him on his oath."[5] In this case, neither the State nor Stinson used this mode of impeachment at trial. Instead, Stinson sought to impeach K. D. based on prior contradictory statements. The court charged the jury on that method of impeachment. The court did not err in refusing to charge the jury on the method of impeachment set forth in the requested charge.

4. Stinson contends that the court erred in refusing to charge the jury on O.C.G.A. § 24-9-68:"The state of a witness's feelings toward the parties and his relationship to them may always be proved for the consideration of the jury."

Stinson argues that this charge should have been given because of the civil lawsuit K. D. filed against him and the county. But, as previously noted, K. D. dismissed that suit. Moreover, the court charged the jury that in passing upon credibility of witnesses, it could consider their interest or lack of interest in the occurrences about which they testified. That was the applicable legal principle here. The court did not err in refusing to give the requested charge.

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[5] O.C.G.A. § 24-9-84 .

5. Contrary to argument advanced by Stinson in his final claim of error, the court did not err in refusing to instruct the jury that it should consider K. D.'s character in determining whether the sexual contact with him was consensual or against her will.

As authority in support of this request to charge, Stinson relied on the rape shield statute.[6] That statute, however, is not directly applicable to sexual offenses such as sexual battery or aggravated sexual battery.[7] Moreover, even if it were directly applicable, it precludes admission of evidence concerning the complaining witness's past sexual behavior unless, among other things, that behavior involved the participation of the accused.[8] Here, there is no evidence of any past sexual behavior between Stinson and K. D. The court did not err in refusing to give this request to charge, as it was not supported by any legal authority.[9]

Judgment affirmed. Andrews, P. J., and Mikell, J., concur

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[6] O.C.G.A. § 24-2-3.

[7] See *Mobley v. State*, 212 Ga. App. 293, 294 (1) (441 S.E.2d 780) (1994).

[8] O.C.G.A. § 24-2-3 (b).

[9] See *Woityra v. State*, 213 Ga. App. 89 (1) (443 S.E.2d 867) (1994).